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v. 24 63

No. 11547

United States Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

RAINIER BREWING COMPANY,
A Corporation,

Respondent.

Transcript of Record

Book of Exhibits
In Five Volumes

Volume III
Pages 605 to 788

Upon Petitions to Review a Decision of the Tax Court of the United States.

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Rotary Colorprint, 870 Brannan Street, San Francisco

No. 11547

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PETITIONER'S EXHIBIT No. 1

This Agreement, made and entered into this 23rd day of April, 1935, by and between Rainier Brewing Company, Inc., a California corporation (hereinafter for convenience termed "Rainier"), party of the first part, and Century Brewing Association, a Washington corporation (hereinafter for convenience termed "Century"), party of the second part,

Witnesseth:

Whereas, Rainier Brewing Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office for the transaction of business located in the City and County of San Francisco, in said State; and

Whereas, Century Brewing Association is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office for the transaction of business located in the City of Seattle, in said State; and

Whereas, Rainier is engaged in the manufacture of beer, ale, alcoholic malt beverages, and other products, with plants located in the City and County of San Francisco, State of California, and in the City of Seattle, County of King, State of Washington, and sells and distributes its products in the eleven western states, the Territories of Alaska and Hawaii, and elsewhere; and

Whereas, Century is engaged in the manufacture of beer and other malt products and is operating a plant in the City of Seattle, State of Washington,

Petitioner's Exhibit No. 1—(Continued)

and markets its products in the States of Washington and Oregon, and the Territory of Alaska and elsewhere; and [631]

Whereas, Rainier and its predecessors in interest have for many years sold and marketed products in the State of Washington and in the Territory of Alaska under the trade names or brands of "Rainier" and "Tacoma," and said names or brands are well and favorably known in said State and Territory as a result thereof; and

Whereas, Century desires to acquire the plant and certain of the personal property of Rainier located in the City of Seattle, State of Washington, by purchase, and to secure, by royalty contract, the sole and exclusive perpetual right and privilege of manufacturing and marketing beer, ale and other alcoholic malt beverages under the trade names and brands "Rainier" and "Tacoma" within the State of Washington and the Territory of Alaska; and

Whereas, Rainier is willing to sell said plant and certain of its personal property and to grant said perpetual right and franchise upon the terms and conditions and for the considerations hereinbelow set forth;

Now, Therefore, for and in consideration of the mutual promises and covenants herein contained, and of the payment to Rainier by Century of the considerations herein agreed to be paid, the parties hereto agree as follows:

Petitioner's Exhibit No. 1—(Continued)

Purchase Agreement

First: Rainier hereby sells to Century, and Century hereby purchases from Rainier, all of the property hereinbelow described, to-wit:

(a) All the following described property situate in the City of Seattle, County of King, State of Washington:

A tract of land comprising portions of tracts 8 and 9 of the Julius Horton tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington, also an unplatted [632] tract of land situated in the L. M. Collins Donation Claim lying between the easterly line of said tract 8 of the Julius Horton tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, page 49, records of King County, Washington, also portion of vacated Nora Street as vacated by Ordinance No. 78 City of Georgetown, also portion of Block 1, Sprague's Addition and vacated alley in said block, also vacated portion of Juneau St. as vacated by Ordinance No. 35490 City of Seattle, the boundaries of said tract of land are more particularly described as follows:

Commencing at the monument marking the intersection of the west line of the said Julius Horton Tracts and the center line of Duwamish Avenue; then S. 34° 23′ 39″ E. along said center line 187.95 feet; thence N. 55° 36′ 21″ E. 30 feet to

Petitioner's Exhibit No. 1—(Continued)

the easterly margin of Duwamish Ave. and the true place of beginning; thence S. 34° 23′ 39″ E. along said easterly margin 1449.08 feet; thence continuing along the northerly margin of Duwamish Ave., S. 66° 47′ 45″ E. 38.19 feet; thence S. 70° 45′ 24″ E. 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street, as the same is set forth in Ordinance No. 35490 of Seattle; thence N. 55° 41′ 06″ E. 123.86 feet along said Juneau Street margin; thence S. 80° 22′ 34″ E. 33.58 feet along the northerly margin of Juneau Street; thence N. 53° 41′ 06″ E. 7.18 feet along said margin of Juneau Street; thence N. 36° 18′ 54″ W. 1472.41 feet to point of curve; thence to the right on a curve of 5977.22 feet radius 64.85 feet; thence S. 55° 36′ 21″ W. 151.00 feet to the place of beginning.

Together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereon; and

(b) Twenty-five hundred (2500) half barrel beer containers to be selected by representatives of each of the parties hereto from the half barrel beer containers belonging to Rainier and located in the territory hereinafter described. [633]

Second: In consideration of the transfer by Rainier to Century of the property hereinbefore described, Century agrees to pay Rainier the sum of Two Hundred Fifty Thousand Dollars ($250,000.00)

Petitioner's Exhibit No. 1—(Continued)

in lawful money of the United States of America, as follows:

> Two Hundred Thousand Dollars ($200,000.00) on or before the 27th day of May, 1935;
>
> Twenty-five Thousand Dollars ($25,000.00) on or before the 27th day of May, 1938; and
>
> The remaining Twenty-five Thousand Dollars on or before the 27th day of May, 1939;

said amounts to be evidenced by the promissory notes of Century, dated as of the date hereof, bearing interest at the rate of five per cent (5%) per annum until paid; said interest to be payable annually.

Third: It is understood and agreed by and between the parties hereto that the real property hereinabove described is subject to the lien of a Deed Trust executed by the predecessor in interest of Rainier to secure bonds issued and outstanding; and that said property can be released from the lien of said Trust Indenture only upon obtaining the unanimous consent of the holders of said bonds issued and outstanding. Rainier agrees that upon the payment of the sum of Two Hundred Thousand Dollars ($200,000.00) hereinabove agreed to be paid, it will cause a portion of said bonds to be called for redemption and will obtain the consent of the holders of the remaining bonds to the release of said property from the lien of said Trust Indenture, and will at such time transfer said property by good and sufficient warranty deed free and clear

Petitioner's Exhibit No. 1—(Continued)

of all liens and encumbrances save and except easements, [634] rights of way, or other covenants, if any, running with the land; taxes and insurance upon said property to be prorated as of the date of transfer. Century, on its part, agrees that simultaneously with the receipt of said deed, it will execute and deliver to Rainier a mortgage upon said property to secure payment of the two promissory notes, each in the sum of Twenty-five Thousand Dollars ($25,000.00), hereinbefore referred to; and to further secure the payment of the royalties in the manner and to the extent hereinafter in this agreement set forth.

Fourth: It is understood and agreed by and between the parties hereto that Rainier may remove from the property herein sold any and all machinery and equipment not affixed to the realty, and may remove any and all personal property not purchased by Century as herein provided.

Fifth: Rainier agrees to sell, and Century agrees to buy, the following personal property located within the territory hereinafter described:

(a) Twenty-five thousand (25,000) cardboard cases of twenty-four (24) empty eleven (11) oz. bottles, each at forty cents (40c) per case;

(b) Any and all beer on hand as of July 1st, 1935, or prior effective date of the royalty agreement hereinafter contained, which inventory Rainier agrees to maintain at a reason-

Petitioner's Exhibit No. 1—(Continued)

able minimum; and which said products shall be purchased, together with the containers, by Century at Rainier's cost;

(c) Any and all dealers' helps and other sales material on hand on July 1st, 1935, which shall be purchased by Century at Rainier's cost; and

(d) Any and all office fixtures and equipment, which shall be purchased by Century at depreciated book value. [635]

Sixth: It is understood and agreed that certain portions of the real property hereinabove described are occupied by tenants under leases heretofore executed by Rainier or its predecessor in interest, or under month to month tenancies; and that Century shall accept title to or possession of said property subject to any and all rights of tenants in possession. Formal assignments of Rainier's interests under any and all such leases shall be executed and delivered to Century as of the date of transfer of title to said real property, and rents shall be prorated between the parties hereto as of said date.

Licensing Agreement

Seventh: Rainier hereby grants to Century the sole and exclusive perpetual right and license to manufacture and market beer, ale, and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade names and brands of "Rainier" and "Tacoma,"

Petitioner's Exhibit No. 1—(Continued)

together with the right to use within said State and Territory any and all copyrights, trademarks, labels, or other advertising media adopted or used by Rainier in connection with its beer, ale, or other alcoholic malt beverages.

Eighth: In consideration of said perpetual right and license, Century agrees to pay to Rainier in cash, lawful money of the United States, a royalty amounting to seventy-five cents (75c) per barrel (consisting of 31 gallons) for every barrel of beer, ale, or other alcoholic malt beverages sold or distributed in the State of Washington and the Territory of Alaska under the said trade names or brands of "Rainier" and "Tacoma," up to a total of one hundred twenty-five thousand (125,000) barrels annually, and [636] eighty cents (80c) per barrel for all such products distributed within said territory annually in excess of said amount of one hundred twenty-five thousand (125,000) barrels; provided, however, that the minimum annual amount to be so paid by Century to Rainier shall be the sum of Seventy-five Thousand Dollars ($75,000.00), which said amount is herein termed "minimum annual royalty." Said payments shall be made in lawful money of the United States as follows:

For the year commencing July 1st, 1935, and ending June 30th, 1936, said minimum annual royalty shall be paid in two installments; the first installment amounting to Thirty-seven Thousand Five Hundred Dollars ($37,500.00) shall be paid on the 31st day of December, 1935, and the remaining in-

Petitioner's Exhibit No. 1—(Continued)

stallment amounting to Thirty-seven Thousand Five Hundred Dollars ($37,500.00) shall be paid on the 30th day of June, 1936. Thereafter said minimum annual royalty shall be payable in four (4) equal quarterly payments amounting to Eighteen Thousand Seven Hundred Fifty Dollars ($18,750.00) each, payable on October 1st, January 1st, April 1st, and July 1st of each year, commencing with October 1st, 1936.

Any and all royalties payable annually in excess of the minimum royalties hereunder shall be paid by Century to Rainier on the 1st day of August of each and every year commencing with the 1st day of August, 1936, which said royalties shall be calculated upon the gross sales for the contract year beginning on the 1st day of July and ending on the 30th day of June immediately preceding the date of payment.

Century agrees that on or before the 15th day of each and every month during the period of time that this agreement remains in force, commencing with the 15th day of [637] August, 1935, it will deliver to Rainier a statement certified to by an authorized officer of Century, showing the gross sales of beer, ale and other alcoholic malt beverages under the said trade names or brands of "Rainier" and "Tacoma" for the calendar month immediately preceding the date of such statement.

Century further agrees that annually on the 1st day of August of each year, commencing with the 1st day of August, 1936, it will deliver to Rainier

Petitioner's Exhibit No. 1—(Continued)

a statement prepared by Price, Waterhouse & Co., or other Certified Public Accountants acceptable to Rainier, showing the sales of beer, ale and other alcoholic malt beverages under the trade names or brands of "Rainier" and "Tacoma" for the contract year commencing July 1st and ending June 30th immediately preceding the date of such statement.

Rainier shall have the right, at its own cost and expense, to examine the books, records and accounts of Century for the purpose of verifying any such statement so submitted to determine the accuracy thereof.

Ninth: Rainier agrees that during the period of time this agreement remains in force, it will not manufacture, sell or distribute, within the territory herein described, directly or through or by any subsidiary company or instrumentality wholly owned or substantially controlled by it, beer, ale, or other alcoholic malt beverages, or directly or indirectly enter into competition with Century in said territory. It is understood and agreed, however, that Rainier shall have the sole and exclusive right to manufacture, sell, and distribute non-alcoholic beverages within said territory under said trade names or brands of "Rainier" and "Tacoma" and any and all other trade names or brands that it owns and desires to use. [638]

Rainier agrees that during the period of time this agreement remains in force it will maintain in full force and effect Federal registrations of

Petitioner's Exhibit No. 1—(Continued)

said trade names or brands, "Rainier" and "Tacoma" and will likewise maintain in full force and effect the present registration of said trade names or brands within the State of Washington and Territory of Alaska. Should Rainier fail to so maintain its rights under said trade names or brands, then and in that event Century shall have the right to pay any and all amounts necessary to so maintain said trade names or brands for and in the name of Rainier, and shall be entitled to deduct any and all amounts so paid from the royalties then due or thereafter becoming due under this agreement.

Tenth: Century agrees that any and all beer, ale, or other alcoholic malt beverages manufactured by it pursuant to this agreement and marketed under said trade names and brands of "Rainier" and "Tacoma" shall at all times be of a quality at least equal to the quality of similar products then manufactured and marketed under said trade names and brands by Rainier; and shall be manufactured under the same formula used in the manufacture of similar products by Rainier, which formulae Rainier shall make available to Century.

Eleventh: It is understood and agreed by and between the parties hereto that should Century at any time be prevented from manufacturing, selling, and distributing beer, ale or other alcoholic malt beverages due to strikes, boycotts, fires, earthquakes or acts of God, for periods of time in excess of three (3) months, and as a result thereof Century shall

Petitioner's Exhibit No. 1—(Continued)

fail to earn a sufficient amount from the operation of its entire business to enable it to pay the royalty next due and payable under this agreement, then [639] and in that event, the time of payment of such royalty shall be deferred for a period of time equal and equivalent to the period during which such cause shall continue, but in no event beyond a date upon which Century has available sufficient funds to pay royalty payments that have accrued; provided, however, that during any such period when royalty payments shall be so deferred, Century shall apply all of its monthly net income derived from the operation of its entire business toward the payment of any royalties so due.

Should the citizens residing in any portion of the territory covered by this agreement elect to adopt local prohibition laws prohibiting the manufacture, sale, and distribution of beer, ale, or other alcoholic malt beverages in such community, and should Century, due to such laws, be unable to sell and distribute within the territory described in this agreement, beer, ale, and other alcoholic malt beverages manufactured under the trade names and brands of "Rainier" and "Tacoma" in a quantity at least equal to fifty-two thousand (52,000) barrels annually, then and in that event, the minimum royalty payable hereunder shall be reduced during the continuance of the operation of such laws by the percentage that the sales of such products under such trade names and brands of "Rainier" and "Tacoma" sold within that particular community

Petitioner's Exhibit No. 1—(Continued)

bear to the total sales of such products by Century under such brands within the entire territory covered hereby, which percentage shall be based upon the average sales of such products theretofore made hereunder.

It is further understood and agreed by and between the parties hereto that should Century at any time [640] be prevented from manufacturing, selling and distributing beer, ale, or other alcoholic malt beverages under the trade names and brands of "Rainier" and "Tacoma," in a quantity at least equal to fifty-two thousand (52,000) barrels annually, due to governmental action, war regulation, or general prohibitory laws adopted by the United States of America or the State of Washington, then and in that event Century shall have the option of terminating this agreement or submitting to arbitration, in the manner hereinafter provided, the question of adjusting the minimum royalties payable hereunder during the continuance of such restriction upon the operation of its business. In the event that Century elects to submit the matter to arbitration, it agrees to abide by any decision rendered by the arbiters, and to pay the minimum royalties so fixed, in the manner and at the times herein provided. Rainier agrees, in the event of such arbitration, to accept the royalties so fixed in satisfaction of the obligation of Century for such period.

Twelfth: Century agrees that upon acquiring title to the real property herein agreed to be sold to it by Rainier, it will, in addition to executing the

Petitioner's Exhibit No. 1—(Continued)

mortgage provided in paragraph Third hereof, execute and deliver to Rainier such document or documents as Rainier shall deem necessary to cause said real property to stand as security for the prompt and faithful compliance by Century of all of its obligations under this agreement, to the end that should Century default in the performance of its obligations under this agreement, and should Rainier elect to terminate this agreement, then and in that event, title to said real property shall pass to Rainier, free and clear of all liens and encumbrances, as and for liquidated damages due to such default. [641]

Century further agrees that should it sell said property, it will, under written agreements satisfactory to Rainier, impound the proceeds received from such sale to the extent of Two Hundred Fifty Thousand Dollars ($250,000.00), or such sums as shall be realized on said sale, which said impounded funds shall thereafter stand as security for the prompt and faithful compliance by Century of all of its obligations under this agreement, and in the event of default, be transferred and delivered to Rainier as and for liquidated damages.

It is understood and agreed by and between the parties hereto that in the event of the default of Century hereunder, the termination of this agreement by Rainier, and the transfer or delivery to Rainier of said real property, or such impounded proceeds as liquidated damages, Rainier shall, in addition thereto, be entitled to recover any and all

Petitioner's Exhibit No. 1—(Continued)

royalties due and payable under this agreement at the time of the termination thereof, which said amounts Century agrees to pay upon demand.

Thirteenth: It is understood and agreed by and between the parties hereto that at any time after this agreement has been in force for five (5) years, Century shall have the right and option of electing to terminate all royalties thereafter payable hereunder by notifying Rainier of its election so to do, and by executing and delivering to Rainier the promissory notes of Century aggregating in principal amount the sum of One Million Dollars ($1,000,000) dated as of the date of the exercise of such option, bearing interest from date at the rate of five per cent (5%) per annum, which said promissory notes shall [642] be divided into five (5) equal maturities and shall be payable respectively on or before one (1), two (2), three (3), four (4), and five (5) years after the dates thereof.

Miscellaneous Provisions

Fourteenth: Century agrees that in the operation of its business during the period of time that this agreement remains in force, and from and after August 1st, 1935, it will purchase from Rainier such quantities of malt as shall be required by it in the manufacture of beer, ale, and other alcoholic malt beverages under the trade names and brands of "Rainier" and "Tacoma"; provided, however, that any such malt so purchased from Rainier shall be purchased upon terms and conditions

Petitioner's Exhibit No. 1—(Continued)

equally as favorable to Century for like quality malt as terms and conditions offered to it by other concerns selling malt within the territory herein described.

Fifteenth: Century agrees that during the period of time this agreement remains in force, it will use its best efforts to increase the volume of sales of beer, ale, and other alcoholic malt beverages manufactured and sold under the trade names and brands "Rainier" and "Tacoma" so that the same shall equal the volume of the sales of all other such products manufactured and sold by Century under other brands within the territory herein described. Century further agrees that during the first two (2) years that this agreement shall be in force, it shall expend for the purpose of advertising such beverages sold under the trade names and brands of "Rainier" and "Tacoma" an amount equal and equivalent to the sum expended by it during said period in advertising [643] all other beverages manufactured and sold by it under other brands within the territory herein described, and that thereafter and as long as this agreement shall remain in force, it will expend in the advertising of the products manufactured and sold under said trade names and brands "Rainier" and "Tacoma" an amount per barrel equal and equivalent to the amount per barrel expended by it in advertising other beverages manufactured and sold by it under any and all other brands within the territory herein described.

Petitioner's Exhibit No. 1—(Continued)

Sixteenth: Century agrees that it will, from time to time and when and as requested by Rainier, sell to Rainier, for distribution by Rainier outside of the territory herein described, products manufactured under said trade names and brands "Rainier" and "Tacoma," which said products shall be sold by Century to Rainier at the cost thereof to Century; and Rainier agrees that it will, from time to time and when and as requested by Century, sell to Century, for distribution by Century within the territory herein described, products manufactured by it in its San Francisco plant under said trade names and brands of "Rainier" and "Tacoma," which said products shall be sold by Rainier to Century at the cost thereof to Rainier. Provided, however, that neither party shall have the right to request delivery of, or purchase, products hereunder in an amount in excess of the surplus products then available for sale by the other party.

Seventeenth: It is understood and agreed by and between the parties hereto that Rainier either owns or controls in excess of a majority of the issued and outstanding shares of the capital stock of Seattle [644] Brewing & Malting Co., a West Virginia corporation, which said corporation is qualified to do business within the State of Washington. Rainier agrees to cause said corporation to amend its Articles or Certificate of Incorporation so as to change its name, and to cause a certified copy of such amended Articles or Certificate of Incorporation to be filed with the Secretary of the State of

Petitioner's Exhibit No. 1—(Continued)

the State of Washington, to the end that Century may either cause a new corportion to be organized under said name, or change the name of Century to Seattle Brewing & Malting Co.

Eighteenth: It is understood and agreed by and between the parties hereto that Rainier, in the conduct of its business within the territory herein described, is obligated under two contracts, one executed between Rainier and Hertz Drivurself Stations, Inc. (Pacific) relating to the automotive equipment now operated out of Rainier's Seattle plant, and the other executed between Rainier and Foster & Kleiser and relating to advertising within the territory herein described. Said agreements and any and all rights thereunder are hereby transferred and assigned to Century, effective July 1st, 1935, and Century hereby agrees to assume, satisfy and discharge any and all obligations of Rainier under such contracts arising from and after July 1st, 1935.

Nineteenth: Rainier will deliver to Century for collection all accounts receivable relating to the business of Rainier in the territory herein described existing on July 1st, 1935, and Century will use its best efforts to collect said accounts receivable, and will, [645] when and as payments are received thereon, deposit the same daily to the credit of Rainier in such bank or banks as Rainier shall direct, or otherwise account therefor daily to Rainier as Rainier shall direct.

Twentieth: Neither this agreement nor any of

Petitioner's Exhibit No. 1—(Continued)

its provisions shall become effective unless and until Century pays to Rainier the sum of Thirty-five Thousand Dollars ($35,000.00) in lawful money of the United States, which payment shall be applied upon the Two Hundred Thousand Dollars ($200,-000) herein in paragraph Second agreed to be paid by Century on or before the 27th day of May, 1935. Upon this agreement becoming effective, the provisions contained in paragraphs First to Sixth, inclusive, hereof, relating to the purchase and sale of property, shall be and become effective immediately, and the remaining provisions, relating to the manufacture of products under the trade names and brands of "Rainier" and "Tacoma," shall become effective on July 1st, 1935; provided that said sum of Two Hundred Thousand Dollars ($200,000.00) shall have been paid on or before the 27th day of May, 1935.

Twenty-First: Should either of the parties hereto desire at any time to submit to arbitration any of the matters which are herein made the subject of arbitration, then and in that event, the party so desiring to submit to arbitration shall notify the other party in writing of its desires in that respect, stating therein the particular question to be so submitted to arbitration, and naming one arbiter. The party receiving such notice shall, within ten (10) days thereafter, select an arbiter and notify the [646] other party of the selection so made. There after, the two arbiters so selected shall meet and select a third arbiter. The decision of such board

Petitioner's Exhibit No. 1—(Continued)

of arbitration upon any such question so submitted shall be final and binding upon the parties hereto.

Twenty-Second: In the event that Century shall fail to fully and promptly carry out the terms and provisions of this agreement or to pay, in the manner and at the times herein provided, the payments herein agreed to be paid by it, and such failure continues for a period of thirty (30) days after written notice to it by Rainier, then and in that event, such failure shall be and become an event of default, and Rainier shall cancel this agreement by written notice to Century. Upon Rainier so notifying Century any and all rights of Century hereunder shall immediately terminate and the liquidated damages, herein in paragraph Twelfth provided, shall be immediately transferred and delivered to, and become the property of, Rainier, without, however, in any way restricting the right of Rainier to enforce payment of any and all amounts then due it hereunder.

Twenty-Third: Except where the context otherwise clearly indicates, the term "contract year" as used herein shall mean a year commencing on the 1st day of July and ending on the 30th day of June of the following year; the term "Rainier" shall mean and include Rainier Brewing Company, Inc., its successors and assigns; the term "Century" shall mean and include Century Brewing Association, its successors and permitted assigns; and the terms "territory herein described" and "territory hereinafter described" shall mean [647] and include

Petitioner's Exhibit No. 1—(Continued)

the State of Washington and the Territory of Alaska.

Twenty-Fourth: This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that no rights of Century hereunder shall be assigned by it without the written consent of Rainier first had and obtained.

Twenty-Fifth: Time is of the essence of this agreement.

In Witness Whereof, the parties hereto have executed this agreement by their officers thereunto duly authorized, and have caused their corporate seals to be hereunto affixed, all as of the day and year first hereinabove written.

RAINIER BREWING COMPANY, INC.

By /s/ L. HEMRICH,
President.

By /s/ A. N. SPECHT,
Secretary,
Party of the First Part.

CENTURY BREWING ASSOCIATION.

By /s/ EMIL SICK,
Vice President.

By /s/ W. H. MACKIE,
Secretary,
Party of the Second Part.

Petitioner's Exhibit No. 1—(Continued)

State of California,
City and County of San Francisco—ss.

On this .... day of April, 1935, before me, James F. McCue, a Notary Public in and for said City and County and State, residing therein, duly commissioned and sworn, personally appeared Louis Hemrich, known to me to be the President, and A. R. Specht, known to me to be the Secretary, respectively, of Rainier Brewing Company, Inc., one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the said corporation, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires February 25, 1938. [649]

State of Montana,
County of Missoula—ss.

On this 6th day of May, 1935, before me, the undersigned, a Notary Public for the State of Montana, personally appeared E. G. Sick, personally

Petitioner's Exhibit No. 1—(Continued)

known to me, and personally known to me to be the President of Century Brewing Association, the corporation that executed the within instrument, and acknowledged to me that said corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Notarial Seal] LILLIAN C. WENZEL,
Notary Public for the State of Montana, Residing at Missoula, Montana.

My commission expires Feb. 10th, 1936.

State of Washington,
County of King—ss.

On this 7th day of May, 1935, before me, J. A. G. Griffith, a Notary Public in and for said City and County and State, residing therein, duly commissioned and sworn, personally appeared W. H. Mackie, known to me to be the Secretary of Century Brewing Association, one of the corporations that executed the within and foregoing instrument, and known to me to be the person who executed the within and foregoing instrument on behalf of the said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my

Petitioner's Exhibit No. 1—(Continued)

hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] J. A. G. GRIFFITH,
Notary Public in and for the City of Seattle, County of King, State of Washington.

My commission expires April 13th, 1938. [650]

At the Trustees meeting held on the 10th day of May, 1935, the following resolution was passed:

> Resolved, that the entry of this Corporation into that certain contract and agreement dated April 23rd, 1935, by and between the Rainier Brewing Company, Inc., a California Corporation, and this Corporation be and the same is hereby authorized and the act of the President and Secretary in executing the same in the name of the Century Brewing Association, a Corporation, be and the same is hereby authorized, ratified, confirmed and approved as the act and deed of this Corporation.

I, W. H. Mackie, Secretary of the Century Brewing Association, do hereby certify that the above resolution is an exact copy of the resolution duly adopted at the meeting of the Board of Trustees of the Century Brewing Association, duly held in Seattle, King County, Washington, on May 10th, 1935.

[Corporate Seal]

/s/ W. H. MACKIE.

Petitioner's Exhibit No. 1—(Continued)

Subscribed and sworn to before me this 10th day of May, 1935, at Seattle, Washington.

[Notarial Seal] J. A. G. GRIFFITH,
Notary Public in and for the State of Washington, residing at Seattle, Washington. [651]

PETITIONER'S EXHIBIT No. 2

Agreement

This memorandum of agreement, signed on behalf of Rainier Brewing Company, a California corporation, by I. E. Epstein, and on behalf of Seattle Brewing & Malting Company, a Washington corporation, successor to Century Brewing Association, by W. H. Mackie,

Witnesseth:

That whereas by a written contract dated April 23, 1935, Rainier agreed to sell and Seattle Brewing & Malting Company agreed to buy twenty-five thousand (25,000) cardboard cases of 24 empty 11 oz. bottles each, at forty cents (40c) per case and

Whereas there have been heretofore received on account of such sale thirteen thousand twenty-one (13,021) such cases, and it is the mutual desire of the parties that the contract for the delivery of the balance due upon said sale be modified in accordance with the understanding hereinafter expressed; and

Whereas there are out in the territory covered

by the State of Washington and the Territory of Alaska an unknown quantity of such empty 11 oz. bottles in the hands of customers who owe balances to Rainier, which said bottles, when and as received by Seattle Brewing & Malting Company will be accepted by Seattle on account of and in satisfaction of the balance of bottles to be received under the contract and which said bottles, it is understood, may be in excess of the balance to be received to accomplish the delivery of 25,000 cardboard cases of such empty bottles. [652]

Now, therefore, it is agreed between the parties that the Century Brewing Association, by its successor, Seattle Brewing & Malting Company, hereinafter referred to as Seattle, will presently pay to Rainier at 40c per case the amount due because of the delivery to it of 13,021 cases and that when and as empty bottles in cardboard cases of 24 empty 11 oz. bottles each are received by Seattle from customers owing balances to Rainier upon its books, Seattle will issue a credit memorandum in duplicate on forms to be furnished by Rainier at 40c per case, one copy of such credit memorandum being delivered to the customer and one copy to be mailed to the San Francisco office of Rainier and will, on or before the 10th day of the month following the month in which such bottles have been received and such credit memorandum issued, pay to Rainier the amount owing because of the issuance of such credit memorandums at 40c per case.

It is further understood that all other bottles received from Rainier customers other than those

from customers owing debit balances to Rainier will be by Seattle, credited on its books to its own accounts with such customers and such bottles will be retained by Seattle without liability to Rainier.

It is further understood that as a result of this modifying agreement no bottles are to be returned to Rainier from the Washington or Alaska territory and that this modifying agreement shall be as between the parties, considered a substitute for and a satisfaction of the obligation contained in the said contract of April 23, 1935, as to Paragraph Fifth (a) thereof. [653]

It is further understood and agreed that this modifying agreement shall not affect the provisions of Paragraph Fifth (b) of said contract but that all bottled beer taken by Seattle under the provisions of said paragraph shall be paid for at Rainier's cost both as to containers and contents.

In witness whereof the parties hereto have caused these presents to be executed this 1st day of July, 1935, at Seattle, Washington.

RAINIER BREWING COMPANY,

By /s/ I. E. EPSTEIN,
Its Asst. Secy.,

SEATTLE BREWING & MALTING COMPANY,

By /s/ W. H. MACKIE,
Its Secretary. [654]

PETITIONER'S EXHIBIT No. 3

This agreement, made and entered into this 18th day of July, 1935, by and between Rainier Brewing Company, Inc., a California corporation (hereinafter for convenience termed "Rainier"), party of the first part, and Seattle Brewing & Malting Company (formerly known as Century Brewing Association), a Washington corporation (hereinafter for convenience termed "Century"), party of the second part,

Witnesseth:

Whereas, the parties hereto made and entered into an Agreement, dated the 23rd day of April, 1935, wherein Rainier, in consideration of the payment of the amounts therein specified and the performance by Century of the covenants, agreements and conditions therein contained, agreed to sell to Century the real and personal property therein described, and granted to Century the rights and licenses therein set forth; and

Whereas, the parties hereto desire to amend and supplement said Agreement to the extent herein set forth;

Now, therefore, for and in consideration of the sum of Ten Dollars ($10.00), lawful money of the United States of America, in hand paid by Rainier to Century, receipt whereof is hereby acknowledged, and in further consideration of the premises and the covenants, promises and agreements herein contained, the parties hereto agree as follows:

(1) That, in order to correctly describe the real

Petitioner's Exhibit No. 3—(Continued)

property which Rainier agreed to sell to Century and Century agreed to buy from Rainier, paragraph First of said Agreement, which said paragraph now reads as follows: [655]

"First: Rainier hereby sells to Century, and Century hereby purchases from Rainier, all of the property hereinbelow described, to-wit:

> (a) All the following described property situate in the City of Seattle, County of King, State of Washington:
>
> A tract of land comprising portions of tracts 8 and 9 of the Julius Horton tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington, also an unplatted tract of land situated in the L. M. Collins Donation Claim lying between the easterly line of said tract 8 of the Julius Horton tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, page 49, records of King County, Washington, also portion of vacated Nora Street as vacated by Ordinance No. 78 City of Georgetown, also portion of Block 1, Sprague's Addition and vacated alley in said block, also vacated portion of Juneau St. as vacated by Ordinance No. 35490 City of Seattle, the boundaries of said tract of land are more particularly described as follows:
>
> Commencing at the monument marking the intersection of the west line of the said Julius

Petitioner's Exhibit No. 3—(Continued)

Horton Tracts and the center line of Duwamish Avenue; thence S. 34° 23′ 39″ E. along said center line 187.95 feet; then N. 55° 36′ 21″ E. 30 feet to the easterly margin of Duwamish Ave. and the true place of beginning; thence S. 34° 23′ 39″ E. along said easterly margin 1449.08 feet; thence continuing along the northerly margin of Duwamish Ave., S. 66° 47′ 45″ E. 38.19 feet; thence S. 70° 45′ 24″ E. 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street, as the same is set forth in Ordinance No. 35490 of Seattle; thence N. 53° 41′ 06″ E. 123.86 feet along said Juneau Street margin; thence S. 80° 22′ 34″ E. 33.58 feet along the northerly margin of Juneau Street; thence N. 53° 41′ 06″ E. 7.18 feet along said margin of Juneau Street; thence N. 36° 18′ 54″ W. 1472.41 feet to the point of curve; thence to the right on a curve of 5977.22 feet radius 64.85 feet; thence S. 55° 36′ 21″ W. 151.00 feet to the place of beginning.

Together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and

(b) Twenty-five hundred (2500) half barrel beer containers to be selected by representatives of [656] each of the parties hereto from the half barrel beer containers belonging to

Petitioner's Exhibit No. 3—(Continued)

Rainier and located in the territory hereinafter described."

be and the same is hereby, amended to read as follows:

"First: Rainier hereby sells to Century, and Century hereby purchases from Rainier, all of the property hereinbelow described, towit:

(a) All the following described property situate in the City of Seattle, County of King, State of Washington:

A tract of land comprising portions of tracts 8 and 9 of the Julius Horton Tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington; also an unplatted tract of land situated in the L. M. Collins Donation Claim lying between the easterly line of said tract 8 of the Julius Horton Tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, page 49, records of King County, Washington, also portions of vacated Nora Street as vacated by Ordinance No. 78 City of Georgetown, also portion of Block 1, Sprague's Addition and vacated alley in said block, also vacated portion of Juneau St. as vacated by Ordinance No. 35490 City of Seattle, the boundaries of said tract of land are more particularly described as follows:

Commencing at the monument marking the

Petitioner's Exhibit No. 3—(Continued)

intersection of the west line of said Julius Horton Tract and the center line of Duwamish Avenue, and thence south 34° 23′ 39″ east along said center line 247.95 feet; thence north 55° 36′ 21″ east 30 feet to the easterly margin of Duwamish Avenue and the true place of beginning; thence south 34° 23′ 39″ east along said easterly margin 1389.08 feet; thence continuing along the northerly margin of Duwamish Avenue south 66° 47′ 45″ east 38.19 feet; thence south 70° 45′ 24″ east 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street as the same is set forth in Ordinance No. 35490 of Seattle; thence north 53° 41′ 06″ east 123.86 feet along said Juneau Street margin; thence south 80° 22′ 34″ east 33.58 feet along the northerly margin of Juneau Street; thence north 53° 41′ 06″ east 7.18 feet along said margin of Juneau Street; thence north 36° 18′ 54″ west 1472.41 feet to a point of curve; thence to the right on a curve of 5877.22 feet radius 4.85 feet; thence south 55° 36′ 21″ west 151 feet, more or less, to place of beginning.

Together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and

(b) Twenty-five hundred (2500) half barrel [657] beer containers to be selected by representatives of each of the parties hereto from

Petitioner's Exhibit No. 3—(Continued)

the half barrel beer containers belonging to Rainier and located in the territory hereinafter described."

(2) That, in order to more fully and correctly set forth the intention and understanding of the parties, paragraph Twelfth of said Agreement, which said paragraph now reads as follows:

"Twelfth: Century agrees that upon acquiring title to the real property herein agreed to be sold to it by Rainier, it will, in addition to executing the mortgage provided in paragraph Third hereof, execute and deliver to Rainier such document or documents as Rainier shall deem necessary to cause said real property to stand as security for the prompt and faithful compliance by Century of all of its obligations under this agreement, to the end that should Century default in the performance of its obligations under this agreement, and should Rainier elect to terminate this agreement, then and in that event, title to said real property shall pass to Rainier, free and clear of all liens and encumbrances, as and for liquidated damages due to such default.

Century further agrees that should it sell said property, it will, under written agreements satisfactory to Rainier, impound the proceeds received from such sale to the extent of Two Hundred Fifty Thousand Dollars ($250,000.00), or such sums as shall be realized on said sale, which said impounded funds shall thereafter stand as security for the

Petitioner's Exhibit No. 3—(Continued)

prompt and faithful compliance by Century of all of its obligations under this agreement, and in the event of default, be transferred and delivered to Rainier as and for liquidated damages.

It is understood and agreed by and between the parties hereto that in the event of the default of Century hereunder, the termination of this agreement by Rainier, and the transfer or delivery to Rainier of said real property, or such impounded proceeds as liquidated damages, Rainier shall, in addition thereto, be entitled to recover any and all royalties due and payable under this agreement at the time of the termination thereof, which said amounts Century agrees to pay upon demand."

be, and the same is hereby, amended to read as follows:

"Twelfth: Century agrees that upon acquiring title to the real property herein agreed to be sold to it by Rainier, it will, in addition to executing the mortgage provided in paragraph Third hereof, execute and deliver to Rainier such document or documents as Rainier shall deem necessary to cause said [658] real property to stand as security for the prompt and faithful performance by Century of all of its obligations under this agreement, to the end that should Century default in the performance of its obligations under this agreement, and should Rainier elect to terminate this agreement, then and in that event, title to said real property shall pass to Rainier, free and clear of all liens and encum-

Petitioner's Exhibit No. 3—(Continued)

brances, as and for liquidated damages due to such default.

Century further agrees that should it sell said property, it will impound, under written agreements satisfactory to Rainier, and with a bank acceptable to Rainier, the proceeds received from such sale to the extent of Two Hundred Fifty Thousand Dollars ($250,000.00), or such sums as shall be realized on said sale, which said impounded funds shall thereafter stand as security for the prompt and faithful performance by Century of all of its obligations under this agreement, and in the event of default, be transferred and delivered to Rainier as and for liquidated damages.

Century further agrees that should it for any reason or cause whatsoever (other than by a sale as authorized in the paragraph immediately preceding) lose title to, or the right to possession of, the real property herein agreed to be sold to it by Rainier, it will, within ten (10) days from the date upon which title to, or the right to possession of, said real property is lost, impound with a bank satisfactory to Rainier, an amount in cash, lawful money of the United States, equal and equivalent to the fair value as of the date of loss of said real property and the improvements located thereon, which money shall be impounded under written agreement satisfactory to Rainier, and shall thereafter stand as security for the prompt and faithful performance by Century of all of its obligations under this Agreement, and in the event of default,

Petitioner's Exhibit No. 3—(Continued)

be transferred and delivered to Rainier as and for liquidated damages; provided, however, that nothing in this paragraph contained shall require Century to deposit cash in excess of the sum of Two Hundred Fifty Thousand Dollars ($250,000.00). The fair value of said property on said date shall be determined by an appraisal made by an appraiser approved in writing by Rainier.

It is the purpose, understanding and intention of the parties hereto that at all times and as long as this Agreement remains in force, the said real property, or the proceeds realized upon the sale thereof (to the extent of not to exceed Two Hundred Fifty Thousand Dollars ($250,000.00) or cash, lawful money of the United States equal and equivalent to the fair value of the property and improvements at the time of loss (not to exceed, however, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) shall stand as security for the prompt and faithful [659] performance by Century of all of its obligations under this Agreement, and in the event of default, be transferred and delivered to Rainier as and for liquidated damages.

It is understood and agreed by and between the parties hereto that in the event of the default of Century hereunder, the termination of this Agreement by Rainier, and the transfer or delivery to Rainier of said real property, or such impounded proceeds or cash as liquidated damages, Rainier shall, in addition thereto, be entitled to recover any and all royalties due and payable under this Agree-

Petitioner's Exhibit No. 3—(Continued)

ment at the time of the termination thereof, which said amounts Century agrees to pay upon demand.

Rainier agrees that any proceeds required to be impounded by Century pursuant to the provisions of this paragraph may be impounded with the Trustee at the time in office under the Trust Indenture executed by and between the parties hereto and The First National Bank of Seattle for the purpose of causing the real property herein in this agreement described to stand as security for the prompt and faithful performance by Century of all of its obligations under this Agreement, as required by the provisions of this paragraph."

(3) On or about the 3rd day of July, 1935, a survey was made of the real property and improvements thereon herein agreed to be sold, a copy of which survey has been received by each of the parties hereto and discloses that certain of the buildings located upon said real property extend beyond the boundary lines of said real property.

Century agrees to, and does, hereby, accept said real property with the buildings and improvements as now located thereon, and hereby expressly releases Rainier from any obligation to correct or remedy the extension or overlapping of said buildings beyond the boundary lines of said property, and also releases Rainier from any liability, financial or otherwise, with respect to said extension and overlapping of said buildings. Century further releases Rainier of and from any obligation or liability with respect to said extension and overlapping

Petitioner's Exhibit No. 3—(Continued)

of said buildings that may exist or hereafter arise by virtue of the covenants, warranties and conditions of any deed executed by Rainier to Century conveying title to said property. [660]

Rainier releases Century of and from any obligation or liability with respect to said extension and overlapping of said buildings that may exist or hereafter arise by virtue of the covenants, warranties and conditions of any Mortgage executed by Century pursuant to the provisions of paragraph Third of said Agreement and of and from any obligation or liability with respect to said extension and overlapping of said buildings that may exist or hereafter arise by virtue of the covenants, warranties and conditions of any conveyance or other agreement executed pursuant to the provisions of paragraph Twelfth of said Agreement.

(4) Except as herein amended and supplemented, said Agreement dated the 23rd day of April, 1935, shall remain in full force and effect.

(5) This Agreement shall be binding upon and insure to the benefit of the parties hereto and their respective successors and assigns.

In witness whereof, the parties hereto have executed this Agreement by their officers thereunto duly authorized, and have caused their corporate seals to be hereunto affixed, all as of the day and year first hereinabove written.

RAINIER BREWING COMPANY, INC.,

By /s/ LOUIS HEMRICH,

President,

Petitioner's Exhibit No. 3—(Continued)

By /s/ A. R. SPECHT,
Secretary,
Party of the first part.

SEATTLE BREWING & MALTING COMPANY
(formerly known as Century Brewing Association),

By /s/ E. G. SICK,
President,

By /s/ W. H. MACKIE,
Secretary,
Party of the second part.

State of California,
City and County of San Francisco—ss.

On this 22nd day of July, in the year one thousand nine hundred and thirty-five, before me, James F. McCue, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Louis Hemrich and A. R. Specht, known to me to be the President and Secretary, respectively, of Rainier Brewing Company, Inc., the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same; and further acknowledged the said instrument to be the free and voluntary act and deed of

Petitioner's Exhibit No. 3—(Continued)

said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

/s/ JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires February 25, 1938. [662]

State of Washington,
County of King—ss.

On this 18th day of July, in the year one thousand nine hundred and thirty-five, before me, Orville H. Mills, a Notary Public in and for the County of King, State of Washington, residing therein, duly commissioned and sworn, personally appeared E. G. Sick and W. H. Mackie, known to me to be the President and Secretary, respectively, of Seattle Brewing & Malting Company, the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same; and further acknowledged the said instrument to be the free and voluntary act and deed of said corporation,

Petitioner's Exhibit No. 3—(Continued)

for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of King, State of Washington, the day and year in this certificate first above written.

/s/ ORVILLE H. MILLS,

Notary Public in and for the County of King, State of Washington.

My commission expires July 4, 1937. [663]

PETITIONER'S EXHIBIT No. 4

This Indenture, made the 18th day of July, in the year One Thousand Nine Hundred and Thirty-five, between Rainier Brewing Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal office for the transaction of business in the City and County of San Francisco, State of California, the party of the first part, and Seattle Brewing & Malting Company (formerly known as Century Brewing Association), a corporation duly organized and existing under and by virtue of the laws of the State of Washington and having its principal office in the City of Seattle, County of King, State of Washington, the party of the second part,

Witnesseth:

That the party of the first part, in consideration of the sum of Ten Dollars ($10.00), lawful money of the United States of America, to it in hand paid by the said party of the second part, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and warrant unto the said party of the second part, its successors and assigns, forever, that certain lot, piece or parcel of land bounded and described as follows, to-wit:

> All the following described property situate in the City of Seattle, County of King, State of Washington:
>
> A tract of land comprising portions of tracts 8 and 9 of the Julius Horton Tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington; also an unplatted tract of land situated in the L. M. Collins Donation Claim lying between the easterly line of said tract 8 of the Julius Horton Tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, page 49, records of King County, Washington, also portion of vacated Nora Street as vacated by Ordinance No. 78 City of Georgetown, also portion of Block 1, Sprague's Addition and vacated alley in said block, also vacated portion of [665] Juneau St. as vacated by Ordinance No. 35490 City of Seattle, the boundaries of said tract of land are more particularly described as follows:

Commencing at the monument marking the intersection of the west line of said Julius Horton Tracts and the center line of Duwamish Avenue, and thence south 34° 23′ 39″ east along said center line 247.95 feet; thence north 55° 36′ 21″ east 30 feet to the easterly margin of Duwamish Avenue and the true place of beginning; thence south 34° 23′ 39″ east along said easterly margin 1389.08 feet, thence continuing along the northerly margin of Duwamish Avenue south 66° 47′ 45″ east 38.19 feet; thence south 70° 45′ 24″ east 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street as the same is set forth in Ordinance No. 35490 of Seattle; thence north 53° 41′ 06″ east 123.86 feet along said Juneau Street margin; thence south 80° 22′ 34″ east 33.58 feet along the northerly margin of Juneau Street; thence north 53° 41′ 06″ east 7.18 feet along said margin of Juneau Street; thence north 36° 18′ 54″ west 1472.41 feet to a point of curve; thence to the right on a curve 5877.22 feet radius 4.85 feet; thence south 55° 36′ 21″ west 151 feet, more or less, to place of beginning.

Together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To Have and to Hold the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever.

In Witness Whereof, the party of the first part has hereunto signed its name and affixed its corporate seal, by its officers thereunto duly authorized, the day and year first hereinabove written.

[Corporate Seal]

RAINIER BREWING COMPANY, INC.

By LOUIS HEMRICH,
President.

By A. R. SPECHT,
Secretary. [666]

State of California,
City and County of San Francisco—ss.

On this 18th day of July, in the year one thousand nine hundred and thirty-five, before me, James F. McCue, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Louis Hemrich and A. R. Specht, known to me to be the President and Secretary, respectively, of Rainier Brewing Company, Inc., the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same; and further acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were

authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

[Notarial Seal] JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires February 25, 1938. [667]

PETITIONER'S EXHIBIT No. 5

This Indenture, made the 19th day of July, A.D. One Thousand Nine Hundred and Thirty-five, between Seattle Brewing & Malting Company, formerly known as Century Brewing Association, a Washington corporation, party of the first part (hereinafter called the "mortgagor"), and Rainier Brewing Company, Inc., a California corporation, party of the second part (hereinafter called the "mortgagee"),

Witnesseth:

That the mortgagor, for and in consideration of the sum of fifty thousand dollars ($50,000.00) lawful money of the United States of America, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the mortgagee, its successors and assigns, the following described tract of land, situate, lying and

being in the City of Seattle, County of King, State of Washington, and particularly bounded and described as follows, to-wit:

> A tract of land comprising portions of Tracts 8 and 9 of the Julius Horton Tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington, also an unplatted tract of land situated in the L. M. Collins Donation Claim lying between the easterly line of said Tract 8 of the Julius Horton Tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, page 49, records of King County, Washington, also portions of vacated Nora Street as vacated by Ordinance No. 78 City of Georgetown, also portion of Block 1, Sprague's Addition and vacated alley in said block, also vacated portion of Juneau St. as vacated by Ordinance No. 35490 City of Seattle, the boundaries of said tract of land are more particularly described as follows: [668]
>
> Commencing at the monument marking the intersection of the west line of said Julius Horton Tracts and the center line of Duwamish Avenue, and thence south 34° 23′ 39″ east along said center line 247.95 feet; thence north 55° 36′ 21″ east 30 feet to the easterly margin of Duwamish Avenue and the true place of beginning; thence south 34° 23′ 39″ east along said easterly margin 1389.08 feet; thence continuing along the northerly margin of Duwamish Avenue

south 66° 47′ 45″ east 38.19 feet; thence south 70° 45′ 24″ east 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street as the same is set forth in Ordinance No. 35490 of Seattle; thence north 53° 41′ 06″ east 123.86 feet along said Juneau Street margin; thence south 80° 22′ 34″ east 33.58 feet along the northerly margin of Juneau Street; thence north 53° 41′ 06″ east 7.18 feet along said margin of Juneau Street; thence north 36° 18′ 54″ west 1472.41 feet to a point of curve; thence to the right on a curve of 5877.22 feet radius 4.85 feet; thence south 55° 36′ 21″ west 151 feet, more or less, to place of beginning.

Together with the tenements, hereditaments, and appurtenances now and hereafter belonging to or used in connection with the above described premises, and all buildings and structures now upon or to be erected upon the said premises or used in connection therewith; and together with the rents, issues and profits of the mortgaged property.

This Conveyance is intended as a mortgage to secure the payment of fifty thousand dollars ($50,000) lawful money of the United States of America, together with interest thereon at the rate of five per cent (5%) per annum from date until paid, according to the terms and conditions of two certain promissory notes each for twenty-five thousand dollars ($25,000.00) and both bearing date May 27th, 1935, made by the mortgagor and payable to the mortgagee or order. [669]

This Mortgage also secures the performance of

the covenants and agreements hereinafter contained, to-wit:

(1) The mortgagor covenants that it is lawfully seized of said premises in fee simple, has good right and lawful authority to convey and mortgage said premises in the manner and form aforesaid, and that said premises are free from encumbrances; and the mortgagor shall and will warrant and defend the same forever against the lawful claims and demands of all persons whomsoever, and this covenant shall not be extinguished by any foreclosure hereof, but shall run with the land.

(2) The mortgagor covenants and agrees to pay all debts and moneys secured hereby when from any cause the same shall become due; not to permit or suffer any tax, assessment or other lien or encumbrance prior to the lien of this mortgage to exist at any time against said premises; during the continuance of this mortgage to pay all taxes and assessments levied or imposed upon the property covered by this mortgage and the debt hereby secured before delinquency, and to secure and deliver to the mortgagee, before any interest or penalty on any tax or assessment shall begin to run or accrue, the official receipt of the proper officer showing payment thereof; not to commit or suffer waste on said premises; to keep all buildings unceasingly insured against loss or damage by fire in manner, form and companies satisfactory to the mortgagee and in a sum not less than $250,000.00 or not less than the full insurable value of such property; to pay all pre-

miums and charges for all such insurance when due, and to deposit with the mortgagee all insurance policies affecting the mortgaged premises; and covenants that all insurance whatsoever affecting [670] the mortgaged premises shall be made payable in case of loss to the mortgagee with a mortgage subrogation clause in favor of and satisfactory to the mortgagee. In case of payment of any policy or any part thereof, the amount so paid shall be applied either upon the indebtedness secured hereby or in rebuilding or restoring the premises, as the mortgagee and mortgagor shall determine at such time.

(3) Should the mortgagor be or become in default in any of the foregoing covenants or agreements, then the mortgagee (whether electing to declare the whole indebtedness hereby secured due and collectible, or not) may perform the same, and all expenditures made by the mortgagee in so doing, or under any of the covenants or agreements hereof, shall draw interest at the rate of ten per cent (10%) per annum, but all such expenditures shall be payable by the mortgagor without demand and together with interest and costs accruing thereon, and shall be secured by this mortgage; and the rights and duties of the parties covenanted for in this paragraph shall apply equally to any and all part payments or advances made by the mortgagee for any of the purposes herein referred to.

(4) Time is material and of the essence hereof, and if default be made in the payment of any of the sums hereby secured or in the performance of any of the covenants herein contained, then in any

such case the balance of unpaid principal with accrued interest or other indebtedness hereby secured shall, at the election of the mortgagee, become immediately due without notice, and this mortgage may be foreclosed; but the failure of the mortgagee to exercise [671] such option in any one or more instances shall not be considered as a waiver or relinquishment of the right to exercise such option in case of any default, but such option shall be and remain continuously in full force and effect.

(5) In any suit to foreclose this mortgage or to collect any charge growing out of the debt hereby secured, or in any suit which the mortgagee may be obligated to defend to effect or protect the lien hereof, the mortgagor agrees to pay a reasonable sum as attorney's fees and all costs and legal expenses in connection with said suit, and further agrees to pay the reasonable cost of searching the records, and said sums shall be secured hereby and included in the Decree of Foreclosure.

(6) The rents, issues and profits of the mortgaged property, to and until the maturity of the indebtedness hereby secured, either by lapse of time or by reason of default of the mortgagor, shall belong to the mortgagor, but upon such maturity of said indebtedness for any cause the mortgagee shall have the right forthwith to enter into and upon the mortgaged premises and take possession thereof and to collect the rents, issues and profits thereof and apply the same, less reasonable costs of collection, upon the indebtedness hereby secured; and the mortgagee shall have the right to the appoint-

ment of a Receiver to collect the rents, issues and profits of the mortgaged premises. Failure on the part of the mortgagee to collect any such rents, issues and profits shall not constitute a waiver of any prior default under the terms and conditions of this mortgage. [672]

(7) Each of the covenants and agreements herein shall be binding upon all successors in interest of the mortgagor, and each shall inure to the benefit of any successors in interest of the mortgagee.

In Witness Whereof, the said mortgagor has caused these presents to be executed by its President and Secretary, thereunto duly authorized, and has caused its corporate seal to be hereunto affixed, the day and year hereinabove first written.

SEATTLE BREWING & MALTING COMPANY.
(Formerly Known as Century Brewing Association)
By EMIL G. SICK,
President.

Attest:

[Corporate Seal] W. H. MACKIE,
Secretary. [678]

State of Washington,
County of King—ss.

This Is to Certify that on this 19th day of July, 1935, before me, the undersigned, a Notary Public in and for the State of Washington, duly commis-

sioned and sworn, personally came Emil G. Sick and W. H. Mackie, to me known to be the President and Secretary, respectively, of Seattle Brewing & Malting Company, formerly known as Century Brewing Association, the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal the day and year in this Certificate first above written.

[Notarial Seal] ORVILLE H. MILLER,
Notary Public in and for the State of Washington,
residing at Seattle, Washington. [674]

PETITIONER'S EXHIBIT No. 6

This Agreement, made and entered into this 19th day of July, 1935, by and between Seattle Brewing & Malting Company (formerly known as Century Brewing Association), a corporation duly organized and existing under and by virtue of the laws of the State of Washington and having its principal office in the City of Seattle, County of King, in said state (hereinafter for convenience termed "Grantor"), party of the first part, The First National Bank of Seattle, a national banking association, having its principal office in the City of Se-

Petitioner's Exhibit No. 6—(Continued)

attle, County of King, State of Washington (hereinafter for convenience termed "Trustee"), party of the second part, and Rainier Brewing Company, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal office in the City and County of San Francisco, in said state (hereinafter for convenience termed Beneficiary"), party of the third part,

Witnesseth:

Whereas, the Grantor and the Beneficiary made and entered into an agreement dated the 23rd day of April, 1935 (hereinafter for convenience termed "Agreement"), wherein the Beneficiary sold to the Grantor and the Grantor purchased from the Beneficiary certain real and personal property therein described, including the real property hereinafter described, and whereby the Beneficiary licensed and authorized the Grantor, upon the terms and conditions therein set forth and in consideration of the prompt payment of the royalties therein agreed to be paid, to manufacture and [675] market beer, ale, and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade names and brands of "Rainier" and "Tacoma," and likewise authorized and permitted the Grantor to use within said state and territory any and all copyrights, trademarks, labels or other advertising media adopted or used

Petitioner's Exhibit No. 6—(Continued)

by the Beneficiary in connection with its beer, ale, and other alcoholic malt beverages; and

Whereas, in said Agreement the Grantor agrees that, upon acquiring title to the real property hereinafter described, it will execute and deliver to the Beneficiary such document or documents as the Beneficiary shall deem necessary to cause said real property to stand as security for the prompt and faithful compliance by the Grantor of all of its obligations under said Agreement, to the end that should the Grantor default in the performance of its obligations under said Agreement and should the Beneficiary elect to terminate said Agreement, then and in that event title to said real property shall pass to the Beneficiary, free and clear of all liens and encumbrances, as and for liquidated damages due to such default, subject, however, to the right of the Grantor to sell said property at any time prior to such default, at the fair market value thereof for cash and to impound under written agreement satisfactory to the Beneficiary, the proceeds received from such sale to the extent of two hundred fifty thousand dollars ($250,000.00), or such lesser sum as shall be realized on such sale, which said impounded funds shall thereafter stand, in lieu of said property, as security for the prompt and faithful performance by the Grantor of all of its obligations under said Agreement, and in the event of default under said Agreement, be transferred and delivered to the Beneficiary as and for liquidated damages; and [676]

Petitioner's Exhibit No. 6—(Continued)

Whereas, a copy of said Agreement, dated the 23rd day of April, 1935, duly identified by the signatures of each of the parties thereto, has been deposited with the Trustee concurrently with the execution hereof, to which said Agreement reference is made for a more complete and detailed statement of the terms and provisions thereof; and

Whereas, the Grantor and the Beneficiary agree that in and by said Agreement the Beneficiary has parted with business, properties and assets, the exact value of which cannot readily be determined, and in the event of default by the Grantor in the performance of the terms and conditions of said Agreement, the Beneficiary will suffer damages which cannot be accurately or definitely computed or measured in money, and said parties agree that in the event of any breach of said Agreement, the real property hereinafter described shall be transferred (or, should it be sold by the Grantor in the manner hereinafter provided, then the cash proceeds, to the amount of $250,000.00, or such lesser sum as shall be received, from such sale shall be paid) to the Beneficiary as and for liquidated damages to compensate the Beneficiary for the damages so suffered. And said parties further agree that the Beneficiary would not have made and entered into said Agreement or have transferred and conveyed to the Grantor the personal and real property therein described, including the real property hereinafter described, or have granted the license therein granted, had the Grantor not agreed to pledge the real property hereinafter described, or

Petitioner's Exhibit No. 6—(Continued)

the cash proceeds to the extent of two hundred fifty thousand dollars ($250,000.00), or such lesser sum as shall be received, from the sale thereof, as security for the prompt and faithful performance by the Grantor of all of the terms and provisions contained in said Agreement; and [677]

Whereas, the Grantor and the Beneficiary desire to carry out the intent and purpose of said Agreement with respect to causing the said real property and said cash proceeds to stand as security for the performance by the Grantor of the terms and provisions of said Agreement;

Now, Therefore, for and in consideration of the sum of ten dollars ($10.00), lawful money of the United States of America, in hand paid by the Beneficiary to the Grantor, receipt whereof is hereby acknowledged, and in further consideration of the conveyance by the Beneficiary to the Grantor of the real and personal property described in said Agreement, and the granting by the Beneficiary to the Grantor of the rights and privileges granted in said Agreement, the Grantor does, by these presents, grant, bargain, sell, convey, and warrant unto the Trustee, party of the second part, and its successors and assigns, as Trustee, forever, that certain lot, piece, or parcel of land bounded and described as follows, to-wit:

All the following described property situate in the City of Seattle, County of King, State of Washington:

A tract of land comprising portions of tracts

Petitioner's Exhibit No. 6—(Continued)
8 and 9 of the Julius Horton Tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington; also an unplatted tract of land situated in the L. M. Collins Donation Claim lying between the easterly line of said tract 8 of the Julius Horton Tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, page 49, records of King County, Washington, also portion of vacated Nora Street as vacated by Ordinance No. 78 City of Georgetown, also portion of Block 1, Sprague's Addition and vacated alley in said block, also vacated portion of Juneau St. as vacated by Ordinance No. 35490 City of Seattle, the boundaries of said tract of land are more particularly described as follows:

Commencing at the monument marking the intersection of the west line of said Julius Horton Tracts and the center line of Duwamish Avenue, and thence south 34° 23′ 39″ east along said center line 247.95 feet; thence north 55° 36′ 21″ east 30 feet to the easterly margin of Duwamish Avenue and the true place of beginning; thence south 34° 23′ 39″ east along said easterly margin 1389.08 feet; thence continuing along the northerly margin of Duwamish Avenue south 66° 47′ 45″ east 38.19 feet; thence south 70° 45′ 24″ east 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street as the same is set forth in Or-

Petitioner's Exhibit No. 6—(Continued)

dinance No. 35490 of Seattle; thence north 53° 41′ 06″ east 123.86 feet along said Juneau Street margin; thence south 80° 22′ 34″ east 33.58 feet along the northerly margin of Juneau Street; thence north 53° 41′ 06″ east 7.18 feet along said margin of Juneau Street; thence north 36° 18′ 54″ west 1472.41 feet to a point of curve; thence to the right on a curve of 5877.22 feet radius 4.85 feet; thence south 55° 36′ 21″ west 151 feet, more or less, to place of beginning.

Together with all and singular the rights, claims, privileges and immunities appurtenant thereto, together with any and all buildings, improvements and appurtenances now standing or at any time hereafter constructed or placed upon said land or any part thereof, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; subject, however, to the prior lien of a mortgage heretofore executed by the Grantor securing the payment to the Beneficiary of the sum of fifty thousand dollars ($50,000.00).

To Have and to Hold all and singular the said premises and properties unto the Trustee, its successors in trust, and assigns, forever.

But in Trust, Nevertheless, with power of sale under and subject to the provisions and conditions hereinafter set forth, for the benefit and security of the Beneficiary, and to secure the prompt and

Petitioner's Exhibit No. 6—(Continued)

faithful performance by the Grantor of each and all of the covenants, agreements and conditions of the Agreement made and entered into by and between the Grantor [679] and the Beneficiary, dated the 23rd day of April, 1935, so that the Beneficiary shall be secured in the performance and observance by the Grantor of each and all of the covenants, agreements, and conditions of said Agreement, and in the event of the default of the Grantor in the performance and observance of any of said covenants, agreements and conditions said property shall be transferred and conveyed unto the Beneficiary, free and clear of all liens and encumbrances, as and for liquidated damages due to such defaults.

And it is hereby covenanted and declared that the trust estate is to be held by the Trustee subject to the covenants, conditions, uses and trusts hereinafter set forth, as follows:

Article I.

Section 1. The covenants, agreements and conditions, the performance and observance of each and all of which are secured by this Indenture and the trust hereby created, are fully set forth in the Agreement made and entered into by and between the Grantor and the Beneficiary, dated April 23rd, 1935, a copy of which said Agreement, duly identified by the signatures of said parties, has been deposited with the Trustee concurrently with the execution hereof. Reference is hereby made to said

Petitioner's Exhibit No. 6—(Continued)

copy of said Agreement for a more complete and detailed statement of its provisions.

Article II.

Section 1. The Grantor covenants and agrees that it will duly and promptly perform and observe each and all the covenants, agreements, and conditions contained in said Agreement and in this Indenture, and will promptly and at the [680] times therein specified, pay to the Beneficiary the payments agreed to be made in and by said Agreement.

Section 2. The Grantor covenants that it is well seized of the property herein conveyed, assigned and pledged; that it has good right, full power, and lawful authority to grant, bargain, sell, and assign, and to convey and pledge the same in the manner and form herein done or intended to be done; and that it will forever warrant and defend the right, title and interest herein conveyed, assigned, and pledged, to the Trustee against the claims of any persons whomsoever.

Section 3. The Grantor covenants and agrees that at any time it will make, execute, acknowledge and deliver, or cause or procure to be made, executed, acknowledged and delivered, all such further and other deeds, transfers, assignments or other instruments, and do, or cause to be done, all such acts and things as reasonably shall be required by the Trustee or the Beneficiary to effectuate the intention of these presents and to assure and to confirm to the Trustee, and its successors in the trust

Petitioner's Exhibit No. 6—(Continued)

and their respective assigns, all and singular the property hereinbefore described, and hereby intended or purported to be conveyed or assigned, so as to render the same available as security for the performance by the Beneficiary of the covenants, agreements, and conditions of said Agreement, according to the intent and purpose herein expressed.

Section 4. The Grantor covenants and agrees that it will cause this Indenture to be duly and properly filed for record and recorded in the office of the County Auditor of King County, State of Washington, with all convenient speed; and that it will hereafter cause to be duly and properly filed for record and recorded, any supplement hereto, or any [681] conveyance or transfer hereunder so far as may be necessary to make this Indenture and all such supplements, conveyances, or transfers, a good and valid lien upon the properties covered hereby against all persons whomsoever.

Section 5. The Grantor covenants and agrees that on demand of the Trustee or the Beneficiary, it will re-execute, re-acknowledge, and re-record and/or re-file this Indenture, or execute, acknowledge, deliver and record a new instrument, and do all other things necessary to be done whenever and as often as needful in order to preserve (as long as said Agreement shall remain in force) the validity and efficacy hereof as a conveyance of, and continuing lien upon, all the property conveyed, as-

Petitioner's Exhibit No. 6—(Continued)

signed or transferred, or intended to be conveyed, assigned or transferred hereby.

The Grantor further covenants and agrees that it will, from time to time, upon the demand of the Trustee or the Beneficiary, and as often as such demand be made, re-execute or renew this Indenture as a chattel mortgage or execute a new or confirmatory chattel mortgage. Any such chattel mortgage shall be substantially in the form of this Indenture and shall contain substantially the same terms, covenants and provisions as this Indenture, or, at the option of the Trustee or the Beneficiary, may be in the customary form of chattel mortgages in use in the County of King, State of Washington, or in such other form as the Trustee or the Beneficiary may deem sufficient for the accomplishment of the purposes hereof.

Section 6. The Grantor covenants and agrees that this Indenture now is, and (subject to the provisions of this Indenture in respect to the release of property from the lien hereof) always will be kept, a first lien upon the property herein described, subject, however, to the prior lien of a mortgage heretofore executed by the Grantor securing the payment [682] to the Beneficiary of the sum of fifty thousand dollars ($50,000.00), and subject further only to taxes, a lien but not delinquent, and to any assessments, covenants and restrictions of record; and that it will not voluntarily create or suffer to be hereafter created, any lien or charge having equality with, priority to, or preference

Petitioner's Exhibit No. 6—(Continued)

over, the lien or charge of this Indenture upon the trust estate, or any part thereof, or upon the income thereof; that forthwith, after the same shall accrue, it will pay, or cause to be discharged and paid, every lawful claim or demand which, if unpaid, might by law be given precedence over the lien or charge of this Indenture upon said property, or any part thereof, or upon the income thereof.

Section 7. The Grantor covenants and agrees that, from time to time, it will pay and discharge, or cause to be paid and discharged, at least five (5) days before delinquency, all taxes, assessments, rates, and governmental charges lawfully imposed upon the trust estate or any part thereof, or upon the income or profits thereof, and also all taxes, assessments, rates and governmental charges lawfully imposed upon the lien or interest of the Trustee in respect to such trust estate or income. The Grantor covenants and agrees that, from time to time, it will keep the Trustee advised as to the payment of such taxes, assessments, rates and governmental charges, and will present such evidence of the payment thereof as the Trustee may require.

Section 8. The Grantor covenants and agrees that, at all times during the existence of this Indenture and until the discharge thereof, it will insure and keep insured, or cause to be insured and kept insured, in some standard and solvent fire insurance company or companies authorized to transact business in the State of Washington, any and all buildings or other structures located upon said property

Petitioner's Exhibit No. 6—(Continued)

against loss or damage by fire, in an amount equal to their fair insurable value as determined [683] by such company or companies or, in the event the fair insurable value cannot be obtained, then in the largest amount in which such insurance is obtainable; that all policies of insurance on such property may contain the standard 100% co-insurance clause and shall be payable to the Trustee, and shall be delivered to it; and that the Grantor shall promptly pay, or cause to be paid, the premium for such insurance as they may become due. In case of any loss under any such policy or policies of insurance, the Trustee, with the consent of the Beneficiary, may adjust, collect and receipt for and compromise all claims under said policy or policies, and any moneys due thereunder shall be paid to the Trustee.

In case any money shall be paid to the Trustee on account of any loss or damage covered by such insurance, the Grantor shall be entitled to use and apply the same for the purpose of repairing, replacing, rebuilding or restoring any part of the property destroyed or damaged, or for the improvement or betterment of such property. The Trustee shall pay over such insurance moneys upon the written request of the Grantor accompanied by a certificate of an Architect, Engineer, or builder, satisfactory to the Beneficiary, showing the expenditures for which such payment is required, which request and certificate shall constitute the full warrant, direction or justification to the Trustee for the payment of such money. The Trustee or the

Petitioner's Exhibit No. 6—(Continued)

Beneficiary, however, shall have the right to require the Grantor to furnish such further evidence as the Trustee or the Beneficiary may deem necessary to establish the right of the Grantor to the payment of such money and to assure the use of such money by the Grantor in accordance with the terms hereof. Until so used by the Grantor as hereinabove provided, all moneys so received by the Trustee shall be retained by the Trustee as part of the trust estate. In case of the failure of the Grantor to pay the premiums on any policy, the Trustee may, in its [684] discretion but without any obligation to do so, pay such premiums, and all moneys so paid by the Trustee, with interest thereon at the rate of six per cent (6%) per annum until paid, shall be repaid to the Trustee by the Grantor upon demand.

Article III.

Release of Trust Estate

Section 1. Upon the request of the Grantor while no event of default exists, as hereinafter defined (or during the existence of an event of default with the written consent of the Beneficiary), such request being evidenced by resolution of its Board of Directors, copy of which, certified under the corporate seal of the Grantor, shall be lodged with the Trustee, the Trustee, but subject to the conditions and limitations in this Article III prescribed, and not otherwise, shall release from the lien and operation of this Indenture, the entire trust estate. The

Petitioner's Exhibit No. 6—(Continued)

resolution requesting such release shall certify that the Grantor has, for a fair and adequate consideration, sold or contracted to sell the trust estate, and such release shall be subject to the following conditions:

(a) The trust estate shall not be released unless and until

(1) the Beneficiary shall have notified the Trustee in writing that the price to be obtained upon the sale of the trust estate is satisfactory to the Beneficiary, and shall have authorized the Trustee to release the trust estate, or

(2) the fair market value of the trust estate shall have been determined by a board of three appraisers composed of realtors doing business and familiar with real estate values in the City of Seattle, one of such appraisers to be selected by the Beneficiary, one to be selected by the Grantor, and the remaining appraiser to be selected by the two so selected. The concurrence of a majority of the members of said board shall be necessary to express the determination of the board with respect to the fair market value of the trust estate, and the findings of the board with respect to the fair market value of the trust estate shall be binding upon the parties hereto; [685]

(b) Concurrently with, and in consideration of, the release of the trust estate, the Grantor shall pay to the Trustee in cash, lawful money of the United States, an amount equal and

Petitioner's Exhibit No. 6—(Continued)

equivalent to the consideration to be received upon the sale of the trust estate, which amount shall in no event be less than the fair market value of the trust estate, as determined in the manner provided in subdivision (a) of this Section 1: provided, however, that nothing herein contained shall require the payment by the Grantor to the Trustee of a sum in excess of Two Hundred Fifty Thousand Dollars ($250,000); and

(c) Concurrently with the release of the trust estate and the payment to the Trustee of the cash required to be paid pursuant to subparagraph (b) hereof, there shall be deposited with the Trustee an agreement in form and contents satisfactory to the Beneficiary, duly executed by the Grantor, the Trustee and the Beneficiary, supplementing this Indenture and providing the terms under which said cash shall be held as security, in lieu of said trust estate, to accomplish the intents and purposes of this Indenture.

Section 2. The Grantor may at any time, with the written consent of the Beneficiary, make any change in the location of any of the buildings or other structures or equipment upon any part of the trust estate, provided that the efficiency and value of said buildings and property shall not be diminshed thereby.

Petitioner's Exhibit No. 6—(Continued)

Article IV.

Possession

Section 1. Unless and until an event of default under said Agreement dated April 23, 1935, shall have happened, the Grantor shall retain possession of the trust estate and shall manage, operate and use the same and every part thereof, with the rights and privileges pertaining thereto, and shall receive, take, use and enjoy the rents, income, earnings and profits thereof.

Article V.

Defeasance

Section 1. If the Grantor shall well and truly perform and observe each and all of the covenants, agreements and conditions of said Agreement, dated April 23, 1935, and shall well and truly keep, perform and observe all covenants and conditions herein required to be kept, performed and observed by it, both according to the true intent and meaning of said Agreement and of this Indenture, and if the Beneficiary shall notify the Trustee in writing of such performance and observance by the Grantor, or if the Grantor shall avail itself of the option expressed in paragraph Thirteenth of said Agreement dated April 23, 1935, and shall cause the payment to the [686] Beneficiary in cash of the sum therein provided to be paid in the event of the exercise of such option, then and in that case, the estate, right, title and interest of the Trustee hereunder

Petitioner's Exhibit No. 6—(Continued)

shall cease and determine and the property, premises, rights and interests hereby conveyed shall revert to the Grantor or to whomsoever may be entitled thereto; and the Trustee, in such case, on demand of the Grantor, and upon written proof from the Beneficiary of such observance and performance, and at the Grantor's cost and expense, shall execute, acknowledge and deliver to the Grantor proper instruments reconveying, transferring and releasing to the Grantor, or to whomsoever may be entitled thereto, but without any covenant of warranty, however, all property, rights and interests then held by the Trustee hereunder.

Article VI.

Default and Remedies

Section 1. An event of default is hereby defined to be the happening of any default or failure on the part of the Grantor in the due observance or performance of any covenant, agreement or condition contained in said Agreement made and entered into between the Grantor and the Beneficiary, dated April 23, 1935.

Section 2. The happening of an event of default shall, for the purpose of this Indenture, be established by written notice addressed to the Trustee by the Beneficiary, which said notice shall state the particular or particulars in which the Grantor is in default in the performance of the covenants, agreements or conditions contained in said Agree-

Petitioner's Exhibit No. 6—(Continued)

ment, dated April 23, 1935, and the Trustee is authorized and directed to conclusively rely upon such certificate and shall not be required to make any inquiry or investigation with respect to the facts therein stated.

Section 3. If an event of default shall happen, then the Trustee shall, upon receipt of such notice, and upon the written request of the Beneficiary, transfer and convey, or cause to be transferred and conveyed, unto the Beneficiary, or its nominee, all of the property, both real and personal, [687] then constituting the trust estate, which said property shall be so transferred free and clear of all liens and encumbrances and as and for liquidated damages due to such default. The Grantor hereby expressly waives any right to the redemption of all or any part of said trust estate and agrees that upon the request of the Beneficiary or the Trustee it will execute, acknowledge and deliver any and all instruments reasonably required to effectuate such transfer of the trust estate.

Any such transfer or conveyance by the Trustee to the Beneficiary, or any person designated by it, shall divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of the Grantor of, in, and to the property and premises constituting the trust estate, and shall be a perpetual bar, both at law and in equity, against the Grantor, its successors and assigns, and against any and all persons claiming or to claim the trust

Petitioner's Exhibit No. 6—(Continued)

estate or any part thereof from, through, or under the Grantor, its successors and assigns.

Article VII.

Concerning the Trustee

The Trustee accepts the trust created in this Indenture, but only upon the terms and conditions hereof, including the following, all of which shall bind the Grantor and the Beneficiary:

Section 1. All recitals, statements and representations of fact herein contained are made solely by and on behalf of the Grantor, and the Trustee assumes no responsibility as to the correctness of any such recitals, statements, or representations, or as to the validity of this Indenture, or for the breach by the Grantor of any of the covenants or agreements hereof or of said Agreement dated April 23, 1935, or for or in [688] respect of the title of the trust estate, or for any other act or thing done or omitted hereunder, except through its own wilfull misconduct or gross negligence.

Section 2. The Trustee shall not be required to see to the recording of this Indenture or of any supplement hereto, or of any further conveyance or transfer hereunder, or to do any other act which may be suitable or proper to be done for the continuing of the lien of this Indenture, or for giving notice of the existence of such lien, or to effect insurance against fire or other damage to the trust estate, or to effect public liability or compensation

Petitioner's Exhibit No. 6—(Continued)

insurance, or to pay or require the payment of taxes, assessments or other charges, or to keep informed or advised as to the taking out of insurance or as to the payment of taxes or assessments of or upon the trust estate or any part thereof.

Section 3. The Trustee shall be entitled to be reimbursed for all proper outlay of every sort and nature made by it and incurred in the acceptance and discharge of its trusts hereunder, and to receive reasonable and proper compensation for all services rendered and duties performed at any time in the discharge of said trusts, and for any damage sustained or incurred by it, or by any of its officers, attorneys, agents, or servants, selected and retained with reasonable care in the performance of the trusts hereunder; and all such outlays, fees and commissions, compensation and disbursements, shall constitute and continue a lien on the trust estate; and the Grantor hereby covenants and agrees to pay the same upon demand.

Section 4. The Trustee or any successor or successors may resign and be discharged from the trust created by this Indenture by an instrument duly executed and acknowledged so as to entitle the same to be recorded, and delivered to the Grantor [689] and the Beneficiary, and upon the acceptance of such resignation by the Grantor and the Beneficiary, or after thirty (30) days from the time such resignation is so delivered, the same shall be complete and effectual, and the Trustee resigning thereafter shall be released from all responsibility and

Petitioner's Exhibit No. 6—(Continued)

liability of every kind and nature created or imposed by virtue of this Indenture, arising after the date of such resignation and delivery, except the duty to deliver to the successor trustee any and all property then constituting the trust estate. Any such resignation shall forthwith be recorded by the Grantor in the office of the County Auditor of King County, Washington.

Section 5. The Trustee, or any successor or successors, may be removed at any time by an instrument in writing executed and acknowledged by the Beneficiary, which instrument shall be delivered to the Grantor and forthwith recorded by it, or at its expense, in the office of the County Auditor of King County, Washington, and the Grantor forthwith shall file a copy of such instrument, certified by said County Auditor, with the Trustee. Neither the removal nor the resignation of any Trustee shall affect its right to receive any compensation then due or owing hereunder, or reimbursement for any advances theretofore made hereunder, with interest as herein provided.

Section 6. In case the Trustee, or any trustee hereafter appointed, at any time shall resign or be removed or otherwise become incapable of acting, a successor or successors may be appointed by an instrument in writing executed and acknowledged by the Beneficiary and delivered to the Grantor, which instrument shall show thereon, in writing, the acceptance of the trust by such successor trustee. The Grantor forthwith shall record any such in-

Petitioner's Exhibit No. 6—(Continued)

strument of appointment in the office of the [690] County Auditor of King County, Washington, and shall file with such successor trustee a copy of such instrument certified by said County Auditor. Any successor trustee so appointed shall be a bank or trust company authorized to transact business in the State of Washington and actually transacting business within the City of Seattle in said State.

Section 7. Any successor trustee appointed hereunder shall execute, acknowledge and deliver to the Grantor an instrument accepting such appointment hereunder, and thereupon such successor trustee, without further act, deed or conveyance, shall be vested with the trust estate and with all the assets, properties, rights, powers and trusts of its predecessor in the trust hereunder, with like effect as if originally named as such trustee herein; but the trustee retiring, nevertheless, on the written demand of the successor trustee, shall execute and deliver an instrument conveying and transferring to such successor trustee, upon the trusts herein expressed, all the trust estate and all the estate, property, rights, powers and trusts of the trustee so retiring, and shall duly assign and deliver to the successor trustee so appointed in its place, all properties and moneys constituting the trust estate then held by it. Should any deed, conveyance or instrument in writing from the Grantor be required by any successor trustee for more fully and certainly vesting in and confirming to it the trust estate and said estate, property, rights, powers and trusts, then

Petitioner's Exhibit No. 6—(Continued)

any and all such deeds, conveyances and instruments in writing, on request of the successor trustee, shall be made, executed, acknowledged and delivered by the Grantor. All such instruments executed under the provisions of this Section forthwith shall be recorded by the Grantor, or at its expense, in the office of the County Auditor of King County, Washington.

Section 8. The Trustee, in the execution of the trusts hereunder, may at any time, instead of acting personally, [691] employ and appoint, and in the name of the Grantor incur expenses in the employment of, attorneys, agents, receivers or employees, and shall be entitled to advice of legal counsel concerning all matters of trust hereof and all duties hereunder, and may in all cases pay such reasonable compensation as such Trustee shall deem proper to all such attorneys, agents, receivers or employees as may be reasonably employed in connection with the trusts hereof; and the Grantor covenants and agrees to repay, upon demand, all such outlays and expenditures so incurred. The opinion of such legal counsel shall be full protection and justification to the Trustee for anything done by it, or permitted to be done, in good faith and in accordance with such opinion.

Section 9. The Trustee shall be protected in acting upon any resolution, declaration, request, demand, order, notice, telegram, cablegram, radiogram, waiver, appointment, consent, certificate, affidavit or statement, or upon any other paper or

Petitioner's Exhibit No. 6—(Continued)

document believed by it to be genuine, and to have been passed, adopted, made, signed, executed, acknowledged, verified or delivered by the proper party.

Section 10. The Trustee shall not be chargeable with knowledge or notice of any default unless notified thereof in writing by the Beneficiary. Upon receipt of any such notice of default, the Trustee may conclusively rely upon the facts therein stated.

Article VIII.

General and Miscellaneous Provisions

Section 1. All the covenants, stipulations, promises and agreements in this Indenture contained by or in behalf of the Grantor shall bind and inure to the benefit of its successors and assigns, whether so expressed or not.

Section 2. Nothing in this Indenture, expressed or [692] implied, is intended or shall be construed to confer upon or give to any person, association or corporation, other than the parties hereto, their successors or assigns, any legal or equitable right, remedy or claim under or by reason of this Indenture, or of any covenant, condition or stipulation hereof; and all the covenants, stipulations, promises and agreements in this Indenture contained are, and shall be held to be, for the sole and exclusive benefit of the parties hereto, their successors and assigns.

Petitioner's Exhibit No. 6—(Continued)

Article IX.

Provisions Contrary to Law

If any one or more of the covenants or agreements provided in this Indenture on the part of the Grantor or the Trustee to be performed shall be contrary to any express provision of law, or contrary to the policy of express law, although not expressly prohibited, or otherwise contrary to good morals or against public policy, then such covenant or covenants, agreement or agreements, shall be null and void, and shall be deemed separable from the remaining covenants and agreements, and shall in no way affect the validity of this Indenture or the objects and purposes intended to be accomplished hereby.

In Witness Whereof, the parties heretofore have caused this Indenture to be executed by their respective officers, thereunto duly authorized, and their respective corporate seals hereunto to be affixed, all as of the day and year first hereinabove written.

SEATTLE BREWING &
MALTING COMPANY
(formerly known as Century
Brewing Association),

By /s/ E. G. SICK,
President,

Petitioner's Exhibit No. 6—(Continued)

By /s/ W. H. MACKIE,
Secretary,
Party of the First Part.

THE FIRST NATIONAL
BANK OF SEATTLE,

By C. L. LeSOURD,
Vice Pres.,

By /s/ CAMPBELL KELLEHER,
Party of the Second Part.

RAINIER BREWING
COMPANY, INC.,

By /s/ LOUIS HEMRICH,
President,

By /s/ A. R. SPECHT,
Secretary,
Party of the Third Part.

State of Washington,
County of King—ss.

On this 19th day of July, in the year one thousand nine hundred and thirty-five, before me, Orville H. Mills, a Notary Public in and for the County of King, State of Washington, residing therein, duly commissioned and sworn, personally appeared E. G. Sick and W. H. Mackie, known to me to be the President and Secretary, respectively, of Seattle

Petitioner's Exhibit No. 6—(Continued)

Brewing & Malting Company, the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same; and further acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the said County of King, State of Washington, the day and year in this Certificate first above written.

/s/ ORVILLE H. MILLS,
Notary Public in and for the County of King, State of Washington.

My Commission Expires July 4, 1937. [695]

State of Washington,
County of King—ss.

On this 19th day of July, in the year one thousand nine hundred and thirty-five, before me, Orville H. Mills, a Notary Public in and for the County of King, State of Washington, residing therein, duly commissioned and sworn, personally appeared C. L. Le Sourd and Campbell Kelleher, known to me to

Petitioner's Exhibit No. 6—(Continued)

be the Vice Pres. and ...., respectively, of The First National Bank of Seattle, the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same; and further acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the said County of King, State of Washington, the day and year in this Certificate first above written.

/s/ ORVILLE H. MILLS,

Notary Public in and for the County of King, State of Washington.

My Commission Expires July 4, 1937. [696]

State of California,
City and County of San Francisco—ss.

On this 22nd day of July, in the year one thousand nine hundred and thirty-five, before me, James F. McCue, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, per-

Petitioner's Exhibit No. 6—(Continued)

sonally appeared Louis Hemrich and A. R. Specht, known to me to be the President and Secretary, respectively, of Rainier Brewing Company, Inc., the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same; and further acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

/s/ JAMES F. McCUE,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires February 25, 1938. [698]

PETITIONER'S EXHIBIT 7

This Agreement, made and entered into this 27th day of March, 1935, by and between Rainier Brewing Company, Inc., a California corporation (hereinafter for convenience termed "Rainier"), party of the first part, and Seattle Brewing & Malting Company (formerly known as Century Brewing Association), a Washington corporation (hereinafter for convenience termed "Century"), party of the second part,

Witnesseth:

Whereas, the parties hereto made and entered into an agreement dated the 23rd day of April, 1935, wherein Rainier, in consideration of the payment of the amounts therein specified and the performance by Century of the covenants, agreements and conditions therein contained, agreed to sell to Century the real and personal property therein described, and grant to Century the rights and licenses therein set forth, which said agreement when separately referred to is hereinafter for convenience termed the "Original Agreement"; and

Whereas, subsequently and as of the 1st day of July, 1935, a memorandum of agreement was made and entered into by and between the parties hereto, modifying to the extent therein set forth, the terms and provisions of the Original Agreement, which said memorandum of agreement, when separately referred to is hereinafter for convenience termed the "Memorandum of Agreement"; and

Whereas, subsequently and on the 18th day of

July, 1935, a further agreement was made and entered into by and between the parties hereto, amending and modifying to the extent therein set forth the terms and provisions of the Original Agreement, which said agreement, dated July 18th, 1935, when separately referred to, [699] is hereinafter for convenience termed the "Amending Agreement;" and

Whereas, said Original Agreement, said Memorandum of Agreement, and said Amending Agreement together constitute one Agreement, and are hereinafter collectively referred to as the "Agreement"; and

Whereas, said Original Agreement provides that Rainier shall sell and Century shall buy at Rainier's cost the bottled inventory and the containers thereof on hand on July 1, 1935, in the territory therein described, which said inventory Rainier agreed to maintain at a reasonable minimum and Rainier has tendered a bill to Century for said bottled inventory and containers asserting a claim in the amount of Fifty-six Thousand Three Hundred Eleven and 84/100 ($56,311.84) Dollars; and

Whereas, Century has paid the sum of Thirty Thousand ($30,000) Dollars on account of the bottled inventory and containers taken over by it on said date and in addition thereto Rainier has credited upon said account the further sum of Eight Hundred Ninety-Seven and 80/100 ($897.80) Dollars so that Rainier's claimed balance due because of such purchase is now the sum of Twenty-

five Thousand Four Hundred Fourteen and 4/100 ($25,414.04) Dollars; and

Whereas, Century has disputed and objected to certain of the items taken into consideration by Rainier in the determination of its cost of said bottled inventory and containers and has asserted that Rainier failed to keep the said inventory at a reasonable minimum; and

Whereas, after full consideration of the matter it is the mutual desire of the parties to adjust and compromise the situation in the manner hereinafter provided; and

Whereas, said Original Agreement further provides that Rainier shall sell and Century shall buy, at the cost thereof to [700] Rainier, any and all dealers' helps and other sales material on hand on July 1st, 1935, within said territory, and Rainier has billed Century for certain Neon signs owned by it and in the hands of customers in said territory on said date at its cost, namely, $3,582.09, and Century contends that it should not be required to pay for said signs due to the fact that said signs were outstanding in the hands of the trade on said date and therefore not available for use by Century, and after fully considering the matter, the parties desire to adjust and compromise the same in the manner hereinafter provided; and

Whereas, the parties hereto desire to further amend and modify certain of the terms and provisions of the Agreement to the extent and in the manner herein set forth;

Now, Therefore, for and in consideration of the

mutual promises and covenants herein contained and of other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

First: That the disputed balance due for said bottled inventory and containers including cartons, shall be and the same is hereby adjusted to and fixed at the agreed sum of Twenty-one Thousand Five Hundred Twenty-two ($21,522) Dollars, which amount Century agrees to pay in the manner hereinafter provided.

Second: That the disputed balance claimed to be due by Rainier for neon signs shall be and the same hereby is adjusted to and fixed at the agreed sum of One Thousand Seven Hundred Ninety-one and 5/100 ($1791.05) Dollars, which amount Century agrees to pay in the manner hereinafter provided.

Third: In settlement of the foregoing total sum of Twenty-three Thousand Three Hundred Thirteen and 5/100 ($23,313.05) [701] Dollars, so agreed to be due and owing, Rainier agrees that it has received and hereby accepts from Century and credits upon said account, seventeen thousand nine hundred thirty-four (17,934) cartons each containing twenty-four 11 oz. bottles, and ten thousand eight hundred eight (10,808) cartons, each containing twelve 22 oz. bottles, credit therefor being given at the rate of sixty-four and one-sixth cents ($.6416-2/3) per carton of twenty-four 11 oz. bottles each, and fifty-five and forty-one and two-thirds hundredths ($.5541-2/3) cents per carton of twelve

22 oz. bottles each, the said credit amounting to the sum of Seventeen Thousand Four Hundred Ninety-seven and 8/100 ($17,497.08) Dollars. The balance constituting the difference between the sum acknowledged to be due by Century to Rainier, that is, between the sum of Twenty-three Thousand Three Hundred Thirteen and 5/100 ($23,313.05) Dollars and the sum of Seventeen Thousand Four Hundred Ninety-seven and 8/100 ($17,497.08) Dollars, satisfied by the delivery of bottles as hereinabove provided, to-wit: the sum of Five Thousand Eight Hundred Fifteen and 97/100 ($5815.97) Dollars has been paid simultaneously with the execution hereof and the receipt thereof is by Rainier acknowledged.

Fourth: Notwithstanding the provisions of Paragraph Ninth of said agreement it is understood and agreed by and between the parties hereto that Rainier is hereby given the special right to sell its special brand known to the trade and labelled and designated as "Rainier Special Export" beer to the Alaska Commercial Company f.o.b. San Francisco for delivery in the territory of Alaska at a price not less than that for which Century would sell such brand f.o.b. Seattle, which right shall continue until ten (10) days after receipt by Rainier of written notice from Century requesting that it discontinue such sales.

At the time of any such sales so made Rainier shall forward to Century duplicate invoices of such sales and shall [702] within thirty (30) days thereafter account to Century for the actual net profit

resulting therefrom. It is understood that Rainier has made such sales between the effective date of said agreement, viz: July 1, 1935, and the date hereof and as to such sales, if any violation of agreement exists because thereof, the same is hereby by Century waived, it being agreed that Rainier will account to Century for the net profit resulting therefrom, which net profit is agreed to be twenty-seven cents ($.27) per carton for both twenty-four 11 oz. bottles and twelve 22 oz. bottles.

The parties hereto do further agree that Rainier shall account to Century for its net profit as to any and all sales made by Rainier under the terms of this paragraph from and after the date hereof until the termination of the special right and privilege herein granted.

Fifth: It is hereby agreed that Paragraph Sixteenth of the Original Agreement shall be and it is hereby amended to read as follows:

> "Sixteenth: Century agrees that it will, from time to time and when and as requested by Rainier, sell to Rainier, for distribution by Rainier outside of the territory herein described, products manufactured under said trade names and brands "Rainier" and "Tacoma", which said products shall be sold by Century to Rainier at a price to be agreed upon by the parties prior thereto; and Rainier agrees that it will, from time to time and when and as requested by Century, sell to Century, for distribution by Century within the territory here-

in described, products manufactured by it in its San Francisco plant under said trade names and brands of "Rainier" and "Tacoma", which said products shall be sold by Rainier to Century at a price to be agreed upon by the parties prior thereto. Provided, however, that neither party shall have the right to request delivery of, or purchase, products hereunder in an amount in excess of the surplus products then available for sale by the other party."

Sixth: Save and except as herein amended, said Agreement as set forth in said Original Agreement, said Memorandum of Agreement, and said Amending Agreement, shall remain in full force and effect, and said Agreement, as set forth in said three Agreements, [703] and in this Agreement, shall be and constitute one Agreement and shall be binding upon, and inure to the benefit of, the parties hereto, their successors and assigns. Provided, however, that no rights of Century hereunder or under said Agreement shall be assigned by it without the written consent of Rainier first had and obtained.

In Witness Whereof, the parties hereto have executed this Agreement by their officers thereunto duly authorized, and have caused their corporate seals to be hereunto affixed, all as of the day and year first above written.

RAINIER BREWING COMPANY, INC.,

By /s/ A. R. SPECHT,

Vice President.

By /s/ I. E. EPSTEIN,
Assistant Secretary.
Party of the First Part.

SEATTLE BREWING & MALTING COMPANY,
(Formerly Century Brewing Association),

By /s/ E. G. SICK,
President.

By /s/ W. H. MACKIE,
Secretary,
Party of the Second Part.

State of California,
City and County of San Francisco—ss.

On this 30th day of December, 1935, before me, James F. McCue, a Notary Public in and for said City and County and State, residing therein, duly commissioned and sworn, personally appeared A. R. Specht, known to me to be the Vice President, and I. E. Epstein, known to me to be the Assistant Secretary, respectively, of Rainier Brewing Company, Inc., one of the corporations that executed the within and foregoing instrument and known to me to be the persons who executed the within and foregoing instrument on behalf of the said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand

and affixed my official seal the day and year in this certificate first above written.

/s/ JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires February 25th, 1938. [705]

State of Washington,
County of King—ss.

On this 27th day of November, 1935, before me, the undersigned, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared E. G. Sick, known to me to be the president, and W. H. Mackie, known to me to be the Secretary, respectively, of Seattle Brewing & Malting Company, one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within and foregoing instrument on behalf of the said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ ORVILLE H. MILLS,
Notary Public in and for the State of Washington, residing at Seattle.

My commission expires July 4, 1937. [706]

PETITIONER'S EXHIBIT 8

Seattle Brewing & Malting Company

July 1, 1940

Rainier Brewing Company, Inc.
1550 Bryant Street
San Francisco, California

Gentlemen:

Pursuant to that right and option granted us in the agreement of April 23, 1935, between Rainier Brewing Company, Inc., a California corporation, and Century Brewing Association, a Washington corporation, to which last named company this company is the successor by change of name, we would advise you of our election to exercise the right and option granted.

We have executed as payable to you, your successors and assigns, and in compliance with your letter of October 22, 1937, are delivering to you through The Anglo California National Bank of San Francisco, and Frank H. Lougher as trustees under the indenture executed by your company, as of September 15, 1937, the promissory notes to be delivered to you simultaneously with our notice of election.

These notes aggregate in principal amount the sum of $1,000,000.00, dated as of July 1, 1940, the date of exercise of our option, and bear interest from date at the rate of 5% per annum. These notes you will find are divided into five equal maturities and are payable respectively on or before one, two, three, four and five years after date.

Since, in your letter of October 22, 1937, you advised us that all payments under the contract should be paid to The Anglo California National Bank of San Francisco, as the corporate trustee under your indenture until such time as we should be furnished with supplemental instructions, and since no supplemental instructions have been given we are delivering the notes to said corporate trustee, assuming that you will work out such assignment with the corporate trustee as may be proper in the premises.

We enclose a copy of our letter of transmittal of the notes to the corporate trustee.

Yours very truly,

SEATTLE BREWING & MALTING COMPANY,

By E. SICK,

President.

EGS:d [707]

July 1, 1940

The Anglo California National Bank
of San Francisco
San Francisco, California

Gentlemen:

Pursuant to that certain right and option granted us in that certain agreement dated April 23, 1935, between Rainier Brewing Company, Inc., a California corporation, and Century Brewing Association, a Washington corporation, to which last named company this company is the successor by change

of name, we would advise you that as of July 1, 1940, we have elected to exercise the right and option granted.

We have executed and are delivering to you and through you to the Rainier Brewing Company, Inc., simultaneously with a notice of election given to the Rainier Brewing Company, Inc., accompanied by a copy of this letter, five promissory notes of Seattle Brewing & Malting Company aggregating in principal amount the sum of $1,000,000, dated as of July 1, 1940, and bearing interest from date at the rate of 5% per annum.

These notes you will find are divided into five equal maturities and are payable respectively on or before one, two, three, four and five years after date.

Delivery of these notes is made to and through you, pursuant to letters of October 22, 1937, from Rainier Brewing Company, Inc., to Seattle Brewing & Malting Company, and of October 23, 1937, from The Anglo California National Bank of San Francisco, to Seattle Brewing & Malting Company, both of which letters refer to an indenture executed September 15, 1937, by Rainier Brewing Company, Inc., to The Anglo California National Bank of San Francisco and Frank H. Lougher, as trustees, under the terms of which letters we were advised that all payments due the Rainier Brewing Company, Inc., under our contract of April 23, 1935, and all rights of Rainier Brewing Company, Inc., under the contract were assigned to said trustees.

As these notes, aggregating $1,000,000, are, since

we have received no notice to the contrary, being delivered to your bank as the corporate trustee under the indenture of September 15, 1937, we simultaneously herewith are notifying [708] the Rainier Brewing Company, Inc., of the delivery of these notes to you and to them in this manner, which notes are enclosed herewith.

We assume that with Rainier Brewing Company, Inc., you will work out such assignment to the trustees as may be proper in the premises.

Very truly yours,

SEATTLE BREWING & MALTING COMPANY,

By ....
President.

EGS:d
Encs: Five (5) notes [709]

Seattle, Washington
July 1, 1940

No. 1
$200,000.00

On or before one (1) year after date and pursuant to the option hereby exercised under that certain agreement dated April 23, 1935, between Rainier Brewing Company, Inc., and Century Brewing Association, a corporation, to which last named corporation the maker hereof is the successor by change of name, the undersigned maker, Seattle Brewing & Malting Company, a Washington corporation, hereby promises to pay to Rainier Brewing Company, Inc., a California corporation, its

successors and assigns, the sum of Two Hundred Thousand Dollars lawful money of the United States of America, with interest from date at the rate of five per cent (5%) per annum.

This note, numbered 1, is one of the five notes of like date and principal amount, payable respectively on or before one (1), two (2), three (3), four (4) and five (5) years after date and aggregating in principal amount one million ($1,000,000.00) dollars.

SEATTLE BREWING & MALTING COMPANY,
By "E. G. SICK",
President.

Attest:
[Seal] "RALPH W. ALLEN",
Secretary.

(A note—the other four notes are identical in wording with the exception of the number of the note, the time of payment and the description of the particular note in the last paragraph.) [710]

PETITIONER'S EXHIBIT 9

Satisfaction of Mortgage

Know All Men By These Presents:

That the Anglo California National Bank of San Francisco and Laurence Tharp (successor to Frank H. Lougher) of San Francisco, California, as Trustees, the assignees of Rainier Brewing Company, Inc., a California corporation, to its interest under

the mortgage hereinafter described, do hereby certify that the mortgage made and executed on the 19th day of July, 1935, by Seattle Brewing & Malting Company, a Washington corporation, with its principal office located in the County of King, State of Seattle, as mortgagor, to Rainier Brewing Company, Inc., a California corporation, with its principal office for the transaction of business located in the City and County of San Francisco, State of California, as mortgagee, to secure the payment of the sum of Fifty Thousand Dollars ($50,000.00) and recorded on July 26, 1935, at 11:07 o'clock a.m., and of record in the Office of the Auditor of King County, Washington, in Volume 1346 of Mortgages on page 345, with the notes secured thereby, is wholly paid and satisfied and the undersigned do hereby consent that the same be fully discharged of record.

In Witness Whereof, The Anglo California National Bank of San Francisco has caused this instrument to be executed on its behalf by its officers thereunto duly authorized and its corporate seal hereunto to be affixed and the said Laurence Tharp has set his hand and seal this 2nd day of February, 1942.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

[Seal] By LINDEN L. D. STARK, Vice President.

By R. H. HOLMBERG, Assistant Secretary.

LAURENCE THARP. [711]

State of California,
City and County of San Francisco—ss.

On this 2nd day of February, 1942, before me, the undersigned, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Linden L. D. Stark, known to me to be the Vice President, and R. H. Holmberg, known to me to be the Assistant Secretary of the corporation that executed the within instrument and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] MARY J. CREECH,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires June 28th, 1945.

State of California,
City and County of San Francisco—ss.

On this 2nd day of February, 1942, before me, the undersigned, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Laurence Tharp, known to me to be the person described in and whose name is subscribed to the within instrument and he acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] MARY J. CREECH,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires June 28th, 1945. [712]

PETITIONER'S EXHIBIT 10

Seattle Brewing & Malting Company
Since 1878
3100 Airport Way MAin 2600
Seattle Washington
Executive Office
306 Marion Building

Emil G. Sick
President
Geo. W. Allen
Vice President and
Managing Director
W. H. Mackie
Manager
Ralph W. Allen
Secretary-Treasurer

April 11, 1942

Mr. Joseph Goldie, President
Rainier Brewing Company
1550 Bryant Street
San Francisco, California

Dear Joe:

Sorry that I did not see you when I went through San Francisco the other day. I have come home to a lot of problems and I hear from the East that no steel has yet been allocated of the 110,000 tons required to make crowns for beer and pop and that it will be at least ten days yet before we know what may be done, which I am afraid in the end will make for curtailment.

The whole of the future looks very uncertain. However, right now I happen to feel in an enterprising mood where I would take a gamble and here is a proposition for your company at the moment, which you can act on, if you wish.

If you want, you let us have a letter stating that the State of Idaho is added to our contract of April 23, 1935, under all the terms and conditions as contained therein for us to use the Rainier brand in consideration of our paying in the month of April the two notes due July 1, 1942, and July 1, 1943, together with accrued interest, then we will pay them.

This is an offer to you without engaging in any long discussions and conferences about a lot of other matters and is open only for immediate acceptance and makes no request for any discounts whatever, and is not a suggestion to bargain, if you want to accept it, O.K., otherwise forget it.

Best regards.

Yours very truly,

/s/ EMIL G. SICK,
President.

8 copies made 4/15/42—HJ
EGS:d [713]

PETITIONER'S EXHIBIT 11

April 13, 1942

Seattle Brewing & Malting Company
306 Marion Building
Seattle, Washington

Dear Sirs:

Reference is made to the agreement made and entered into on April 23, 1935, by and between Rainier Brewing Company, Inc., (one of the predecessors of the undersigned), party of the first part, and your company (then known as Century Brewing Association), party of the second part, which said agreement was amended by a memorandum of agreement executed on July 1, 1935, and agreements executed on July 18, 1935, and November 27, 1935. Said agreement, as so amended, is hereinafter termed "the agreement."

In consideration of your paying the principal and interest to date of payment of your two promissory notes, each in the principal sum of $200,000, and payable to the undersigned on July 1, 1942, and July 1, 1943, respectively, it is agreed that the territory described in the agreement shall be enlarged so as to include the State of Idaho, and you are hereby granted, subject to all the terms and provisions of the agreement, the sole and perpetual right and license to manufacture and market beer, ale, and other alcoholic malt beverages within the State of Idaho under the trade names and brands of "Rainier" and "Tacoma", without the payment of any royalty therefor other than the payment of the

remaining promissory notes heretofore given by the Seattle Brewing & Malting Company in settlement of all royalty payments under said agreement of April 23, 1935. The undersigned hereby expressly reserves the right to manufacture and/or market beer, ale, and other alcoholic malt beverages within the State of Idaho under trade names and brands other than "Rainier" and "Tacoma".

This amendment of the agreement has been authorized by the Board of Directors of the undersigned [714] and is subject to your acceptance, in writing, in the space indicated, after approval by your Board of Directors.

Very truly yours,

RAINIER BREWING COMPANY,

By /s/ JOSEPH GOLDIE,
President.

By /s/ F. S. SMITH,
Secretary.

The foregoing amendment to the agreement therein described is hereby accepted this 14th day of April, 1942.

SEATTLE BREWING & MALTING COMPANY,

By /s/ E. G. SICK,
President.

By /s/ RALPH W. ALLEN,
Secretary. [715]

PETITIONER'S EXHIBIT No. 12

Seattle Brewing & Malting Company
Since 1878
3100 Airport Way MAin 2600
Seattle, Washington
Executive Offices
306 Marion Building

Emil G. Sick
President
Geo. W. Allen
Vice-President and
Managing Director
W. H. Mackie
Manager
Ralph W. Allen
Secretary-Treasurer

November 25, 1942

Rainier Brewing Company
1550 Bryant
San Francisco, California

Gentlemen:

This letter will evidence our understanding that as you have released the Seattle Brewing & Malting Company and its successors in interest of and from all past, present or future claims or obligations existing or arising out of the provisions of Paragraph Fourteenth of the Miscellaneous Provisions of that certain agreement between your company and our company, dated April 23, 1935, with refer-

Petitioner's Exhibit No. 12—(Continued)

ence to the purchase of malt, we on our part, have released and do hereby release Rainier Brewing Company and its successors in interest of and from all obligations to sell or supply malt to the Seattle Brewing & Malting Company because of the provisions of said Paragraph Fourteenth, it being our understanding that by the exchange of these letters said Paragraph Fourteenth is to all intents and purposes cancelled as a subsisting paragraph of the agreement.

Very truly yours,

SEATTLE BREWING & MALTING CO.

By /s/ GEO. W. ALLEN,

Vice-President and Managing Director. [716]

(Copy)

1550 Bryant
San Francisco, California
November 25, 1942

Seattle Brewing & Malting Company
3100 Airport Way
Seattle, Washington

Gentlemen:

In consideration of your having arranged for the payment to us of the indebtedness evidenced by those two certain promissory notes dated July 1, 1940, and numbered 4 and 5, in the principal amount of $200,000 each, together with interest thereon from date to date of payment, less the sum of $10,000 on

Petitioner's Exhibit No. 12—(Continued)

account of such interest, the said notes having been given pursuant to an option exercised by you in connection with that certain agreement dated April 23, 1935, between Rainier Brewing Company, Inc., (to which the undersigned Rainier Brewing Company is the successor by merger), Party of the First Part, and Century Brewing Association, (to which your company is successor by change of name), Party of the Second Part, we would advise you that:

First. We have this day executed a direction to the Seattle-First National Bank, successor to the First National Bank of Seattle, as trustee, named in that certain trust indenture dated July 19, 1935, releasing the properties held by them pursuant to the terms of said trust indenture, from the lien thereof and directing the said bank to reconvey all property held by them pursuant thereto to Seattle Brewing & Malting Company.

Second. We have further, in consideration of your obtaining the advance payment of the two promissory notes hereinbefore referred to, released and do hereby release Seattle Brewing & Malting Company and its successors in interest, of and from all past, present or future claims or obligations existing or arising out of the provisions of Paragraph XIV of the Miscellaneous provisions of said agreement of April 23, 1935, with reference to the purchase of malt.

Third. We do further, in consideration of your obtaining the advance payment of the notes hereinbefore referred to, agree that the license granted

Petitioner's Exhibit No. 12—(Continued)

by the terms of said agreement of April 23, 1935, and the amendment thereof dated April 13, 1942, extending the territory covered thereby to include the state of Idaho, shall [717] be considered amended as to Paragraph XXIV of said agreement of April 23, 1935, so that the right to manufacture and sell beer under the trade names "Rainier" and "Tacoma" within the territories covered by said agreement may by the Seattle Brewing & Malting Company be extended to any plant or plants of any brewing company located within the states of Washington, Idaho or the Territory of Alaska of which the Seattle Brewing & Malting Company may be the owner or in control, this without the necessity of securing the written consent of the undersigned in connection therewith.

Fourth. We further enclose herewith copy of our corporate resolution authorizing the undersigned as officers of Rainier Brewing Company to execute the foregoing letter as the act and deed of Rainier Brewing Company.

Very truly yours,

RAINIER BREWING COMPANY.

[Seal] By JOSEPH GOLDIE,
President.

Attest:

F. S. SMITH,
Secretary. [718]

Petitioner's Exhibit No. 12—(Continued)
Rainier Brewing Company
Established 1878
November 25, 1942

Seattle-First National Bank
Second at Cherry
Seattle, Washington
Attention: Mr. C. L. LeSourd

Gentlemen:

Reference is made to the agreement made and entered into the 19th day of July, 1935, by and between Seattle Brewing & Malting Company, (formerly known as Century Brewing Association,) Grantor, Party of the First Part, the First National Bank of Seattle, a national banking association, (now known as Seattle-First National Bank,) Trustee, Party of the Second Part, and Rainier Brewing Company, Inc., (now known as Rainier Brewing Company,) Beneficiary, Party of the Third Part, pursuant to which agreement the property therein described was conveyed to you in trust for the purposes therein expressed, particular reference is made to Article V, Section 1 of said agreement.

The undersigned, Rainier Brewing Company, (successor by merger to Rainier Brewing Company, Inc.,) the present Beneficiary under said agreement, acknowledges that Seattle Brewing & Malting Company, pursuant to Paragraph Thirteenth of the agreement dated April 23, 1935, (which said agreement is more fully described and referred to in the July 19, 1935 agreement), has executed

Petitioner's Exhibit No. 12—(Continued)

and delivered to the undersigned the five (5) promissory notes provided for in said Paragraph Thirteenth and has paid the principal amount of said notes in full and interest thereon in accordance with the agreement of the parties, and acknowledges that accordingly and pursuant to the provisions of said agreement dated July 19, 1935, the properties described in or held by you pursuant to said agreement of July 19, 1935, are released and should be by your bank as trustees released from the terms and lien of said trust indenture, together with any and all sums of money held by you as security under or pursuant to the terms of said agreement because of any properties heretofore released from the lien of said trust indenture.

This letter shall constitute your authority to execute, acknowledge and deliver to the Seattle Brewing & Malting [719] Company, formerly known as Century Brewing Association, a proper reconveyance of all of the property, rights and interests held by you as Trustee under the provisions of the agreement and trust indenture of July 19, 1935, hereinbefore referred to, free and clear of any lien because thereof and to satisfy in full the mortgage evidenced thereby.

Very truly yours,

RAINIER BREWING COMPANY.

[Corporate Seal]

By JOSEPH GOLDIE,
President.

Petitioner's Exhibit No. 12—(Continued)

Attest:

F. S. SMITH,
Secretary.

CJM:avb [720]

This Indenture, Made this Twenty-fifth day of November, in the year of our Lord One Thousand Nine Hundred and forty-two, Between Rainier Brewing Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, the party of the first part, and Seattle Brewing & Malting Company, a Washington corporation the party of the second part;

Witnesseth: That the said party of the first part, for and in consideration of the sum of One ($1.00) Dollar, lawful money of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents, remise, release and forever quitclaim unto the said party of the second part and to its successors and assigns all right, title, interest and estate of said party of the first part in and to all that certain lot, piece or parcel of land situate, lying and being in the County of King, State of Washington, and particularly bounded and described as follows, to-wit:

All the following described property situate in the City of Seattle, County of King, State of Washington: A tract of land comprising portions of Tracts 8 and 9 of the Julius Horton Tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington; also an unplatted tract of land

Petitioner's Exhibit No. 12—(Continued)

situated in the L. M. Collins Donation Claim lying between the easterly line of said tract 8 of the Julius Horton Tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, Page 49, records of King County, Washington, also portion of vacated Nora Street as vacated by Ordinance No. 78 City of Georgetown, also portion of Block 1, Sprague's Addition and vacated alley in said block, also vacated portion of Juneau St. as vacated by Ordinance No. 35490 City of Seattle, the boundaries of said tract of land are more particularly described as follows: Commencing at the monument marking the intersection of the west line of said Julius Horton Tracts and the center line of Duwamish Avenue, and thence south 34° 23′ 39″ east along said center line 247.95 feet; thence north 55° 36′ 21″ east 30 feet to the easterly margin of Duwamish Avenue and the true place of beginning; thence south 34° 23′ 39″ east along said easterly margin 1389.08 feet; thence continuing along the northerly margin of Duwamish Avenue South 66° 47′ 45″ east 38.19 feet; thence south 70° 45′ 24″ east 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street as the same is set forth in Ordinance No. 35490 of Seattle; thence north 53° 41′ 06″ east 123.86 feet along said Juneau Street margin; thence south 80° 22′ 34″ east 33.58 feet along the northerly margin of Juneau Street; thence north 53° 41′ 06″ east 7.18 feet along said margin of Juneau Street; thence north 36° 18′ 54″ west 1472.41 feet to a point of

Petitioner's Exhibit No. 12—(Continued)

curve; thence to the right on a curve of 5877.22 feet radius 4.85 feet; thence south 55° 36′ 21″ west 151 feet more or less to place of beginning.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and to Hold all and singular the said premises, together with the appurtenances, unto said party of the second part and to its successors and assigns forever.

In Witness Whereof, The said party of the first part has caused these presents to be executed by its President and attested by its Secretary and its corporate seal to be hereunto affixed, on the day and year first above written.

Signed, Sealed and Delivered in Presence of

RAINIER BREWING COMPANY.

[Corporate Seal]

By JOSEPH GOLDIE,
President,

And

F. S. SMITH,
Secretary. [721]

Petitioner's Exhibit No. 12—(Continued)
State of California,
City and County of San Francisco—ss.

On this 25th day of November A.D. 1942 before me personally appeared Joseph Goldie and F. S. Smith, to me known to be the president and secretary, respectively, of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires 9 May 1946. [722]

Whereas, an agreement was made and entered into the 23rd day of April, 1935, by and between Rainier Brewing Company, Inc. (the predecessors of this Company), Party of the First Part, and Century Brewing Association (now known as Seattle Brewing & Malting Company), Party of the Second Part (hereinafter referred to in these resolutions as "Seattle"), which said agreement, as subsequently amended, grants to Seattle, upon the

Petitioner's Exhibit No. 12—(Continued)

terms and conditions therein expressed, the sole and exclusive perpetual right and license of manufacturing and marketing beer, ale and other alcoholic malt beverages under the trade names and brands "Rainier" and "Tacoma" within the States of Washington and Idaho and the Territory of Alaska; and

Whereas, pursuant to Paragraph Thirteenth of said agreement, Seattle executed and delivered to this Company the five (5) promissory notes of Seattle, each in the principal sum of $200,000.00, dated July 1, 1940, bearing interest at the rate of five per cent per annum and maturing, respectively, on July 1, 1941, July 1, 1942, July 1, 1943, July 1, 1944, and July 1, 1945, of which said notes Seattle has paid the first three maturing respectively on July 1, 1941, July 1, 1942, and July 1, 1943, and there remains unpaid the two of said five promissory notes maturing respectively on July 1, 1944, and July 1, 1945, together with interest thereon from July 1, 1940, at the rate of five per cent per annum; and

Whereas, to secure the performance of the covenants and agreements of Seattle contained in said agreement dated the 23rd day of April, 1935, a trust agreement was made and entered into the 19th day of July, 1935 by and between Seattle, as Grantor, Party of the First Part, the First National Bank of Seattle (now known as Seattle-First National Bank), as Trustee, Party of the Second Part, and Rainier Brewing Company, Inc. (the predecessor of this company), Beneficiary, Party of the Third

Petitioner's Exhibit No. 12—(Continued)

Part, under which said trust agreement certain property was placed in trust upon the understanding that said property would be released from the lien of said trust agreement upon the happening of one or the other of the following events, a) the performance by Seattle of all of its covenants and agreements contained in said agreement dated April 23, 1935; or b) should Seattle elect to deliver to this company the five (5) promissory notes provided for in Paragraph Thirteenth of said agreement of April 23, 1935, upon the full payment of the principal amount of said promissory notes and interest thereon; and

Whereas, Seattle has offered to pay to this company the remaining two promissory notes maturing respectively July 1, 1944, and July 1, 1945, together with interest thereon at the rate of five per cent per annum from July 1, 1940, to date of payment, less the sum of Ten Thousand Dollars ($10,000.00) on account of such interest, in consideration of a) the release of the property now held in trust under said July 19, 1935 agreement; b) the release by this company of Seattle from all past, present or future claims or obligations existing or arising out of the provisions of Paragraph Fourteenth of said April 23, 1935 agreement, which said paragraph relates to the purchase of malt; and c) the consent of this company to the amendment of Paragraph Twenty-fourth of said agreement of April 23, 1935, so as to permit [723] Seattle to authorize beer to be manufactured and sold under the trade

Petitioner's Exhibit No. 12—(Continued)

names "Rainier" and "Tacoma" within the territory covered by said agreement by any plant or plants of any brewing company located within the States of Washington and Idaho or the Territory of Alaska, and owned or controlled by Seattle without, in each instance, requiring the written consent of this company; and

Whereas, there has been submitted to this Board of Directors the documents required to accomplish the foregoing, copies of each of which, identified by the initials of the Secretary of this company, are attached to the minutes of this meeting,

Now, Therefore, Be It Resolved, that Mr. Joseph Goldie as President and Mr. F. S. Smith as Secretary be, and they hereby are authorized and directed, for and in behalf, and in the name of this company, to execute and deliver to Seattle upon the payment by it of the sum of Four Hundred Thousand Dollars ($400,000.00), together with interest thereon at the rate of five per cent per annum from July 1, 1940 to date of payment, less the sum of $10,000.00 on account of such interest, the following:

1. A written authorization in the form submitted at this meeting addressed to Seattle-First National Bank, authorizing the release of the property now held in trust under the July 19, 1935 agreement above described;

2. A quitclaim deed in the form submitted to this meeting whereby this company quitclaims to

Petitioner's Exhibit No. 12—(Continued)

Seattle all right, title and interest in and to the real property now held in trust under said agreement dated July 19, 1935;

3. A letter addressed to Seattle Brewing & Malting Company in the form submitted to this meeting releasing Seattle from liability under Paragraph Fourteenth of said agreement of April 23, 1935, and consenting, to the extent hereinabove set forth, to the modification of Paragraph Twenty-fourth of said agreement;

4. A certified copy of these resolutions;

5. The two promissory notes of Seattle Brewing & Malting Company, each in the principal sum of Two Hundred Thousand Dollars ($200,000.00), dated July 1, 1940, bearing interest at the rate of five per cent per annum and maturing July 1, 1944, and July 1, 1945, which said promissory notes, in accordance with the request of Seattle, have been endorsed as follows:

> "Pay to the order of Seattle-First National Bank, Seattle, Washington, without recourse"

and

Be It Finally Resolved that to accomplish the payment to this company of the amount due it and the delivery to Seattle of the documents above described, said officers be and [724] they are hereby authorized and directed to execute and deliver to the Anglo California National Bank of San Francisco such escrow instructions as they, in their opinion, deem appropriate.

Petitioner's Exhibit No. 12—(Continued)

I, F. S. Smith, do hereby certify that I am, and at all times herein mentioned have been, the Secretary of Rainier Brewing Company, a California corporation; that the above and foregoing is a full, true and correct copy of a resolution of the Board of Directors of said Rainier Brewing Company duly passed and adopted at a special meeting of the Board of Directors held on the 25th day of November, 1942; that a quorum of said Board was present and acted throughout said meeting, and that said resolution was unanimously adopted.

I further certify that said resolution has not been revoked nor modified in any way and is in full force and effect.

Witness my signature and the seal of said corporation this 25th day of November, 1942.

[Seal] F. S. SMITH,
Secretary, Rainier Brewing Company. [725]

PETITIONER'S EXHIBIT No. 31

Prohibition in the United States, Local Option

Georgia, local option, after many years of trial, was of benefit chiefly as a demonstration of how NOT to solve the problem.

This leaves Mississippi the only one of the states adopting prohibition in the pre-national prohibition period which might furnish a justifiable argument for the local option step theory. But there local option was used as a means to head off prohibition. The leading history of prohibition in Mississippi

Petitioner's Exhibit No. 31—(Continued)

states that in 1886, the year the local option was was enacted, "beyond all doubt, the most substantial citizens favored prohibition."[7] It also says: "In the years clustering close around 1886, as well as in that year itself, many conventions were held all over the state, including a statewide convention once a year, and also hundreds of fine prohibition articles appeared in the various papers in the state friendly to prohibition."[8] As in other local option states, these great meetings and articles died out. In 1890, when a state constitutional convention was held, strong effort was made to get prohibition incorporated in the state constitution. But local option helped to prevent it.[9] In 1902 there was another movement for state prohibition but it failed. It thus took twenty-two years to take the step from the passage of the local option law in 1886 to the adoption of state prohibition in 1908.

Virginia, which voted for state prohibition in 1914, probably more than any other state furnishes an apparent argument for the step theory. Its record is exceptional in that more stages were involved in the process of reaching prohibition than in any other state. Since 1886 there had been a local option law which had been supplemented by laws passed in 1904 and 1908. By 1914 of the one hundred counties, sixty were no-license, although these con-

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[7]T. J. Bailey, Prohibition in Mississippi, 1917, p. 60.

[8]Ibid., p. 69.

[9]Ibid., p. 80.

Petitioner's Exhibit No. 31—(Continued)

tained only five cities with a population of five thousand or more.

The Virginia Legislature did not pass a prohibitory law, neither did it submit the question to the people. The complicated process was as follows:

A. The Legislature passed an enabling act permitting the people to vote for or against prohibition conditional upon the obtaining of signatures requesting such a vote equal in number to one-fourth of the voters at the preceding state election.

B. A petition for such signatures was circulated and an election called.

C. The people voted for the principle of prohibition on September 22, 1914, by a majority of 30,365, nearly 60 per cent voting in favor of prohibition.

D. The law for carrying the principle into effect had to be enacted by the Legislature although certain features were included in the enabling act.

E. The interval between the vote of the people and the going into effect of the law was over twenty-five months, the longest interval of any state, with one exception. The law went into effect November 1, 1916.

F. The lax provisions of the law, it permitting the manufacture of certain classes of liquor for sale outside the state and permitting the bringing in of liberal quantities of liquor for personal use, made it in substance an anti-saloon law rather than a prohibition law. The importation from other states

Petitioner's Exhibit No. 31—(Continued)

was remedied only by federal legislation when Congress passed the Reed Amendment in 1917.

Thus the requirement of both special legislation and a petition to bring on a vote, the long interval, and the partial provisions of the law constituted three stages or steps additional to those customary in most of the states. In Virginia, going from local option to prohibition was more like an obstacle race than a step. One of the reasons seems to have been that some of the leaders of the Anti-Saloon League there were obsessed to an extraordinary degree by the step theory and permitted that theory to dominate their program.

2. Local option was subject to such continuous, and sometimes violent, fluctuations and reactions that instead of being a step toward prohibition, it frequently led in the opposite direction.

The earlier waves and recessions in a number of states have been referred to. There remains to be studied the period preceding 1914. A study follows, comparing the number of dry counties in the different states in 1914 with the number in 1908. In two New England states, instead of counties, the cities and towns are taken as the basis of comparison. The year 1908 is taken because that was the first year of a series of years when adequate facts are easily accessible.

The results show that in ten states there was a decrease in the number of dry counties. In three, Ohio, Indiana and Oregon, there was a very decided falling off from previous years. In Ohio there was

Petitioner's Exhibit No. 31—(Continued)

a decrease in dry counties from sixty-two out of eighty-eight in 1910, to forty-five in 1914, due to dry counties voting wet. This was followed by a reduction to eighteen dry counties in 1916, due to the repeal of the county option law. [745]

In Indiana and Oregon the falling off was due to the repeal of the county option law, Indiana falling from seventy dry counties in 1909 to twenty-four in 1912 and thirty in 1914. In Oregon the dry counties fell from twenty-one in 1908 and twenty-three in 1909, to five in 1914.

Other recessions were: Illinois, thirty-six to thirty-three; Missouri, seventy-seven to seventy-four; Colorado, eleven to ten; California, five to one, and Washington, ten to six.[10]

In Massachusetts there was a decline from seventeen no-license cities in 1908, and twenty in 1909,

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[10]The information upon which this study was made was obtained chiefly from the annual Year Books of the Anti-Saloon League. The amount of dry territory in a state in a mentioned year is that given in the Year Book for that year and is presumed to be the area dry at the beginning of that year. This may not be true in all cases but inasmuch as most of the data used is for the purpose of comparison the general conclusions are not seriously affected even though in some cases the data may belong to the year preceding instead of the year mentioned. In some cases the figures may not be absolutely accurate but where other or later information has indicated a correction it has been made. In general the figures of the leading organization advocating local option have been assumed to be substantially correct.

Petitioner's Exhibit No. 31—(Continued)

to fourteen in 1914. No-license towns fell from two hundred and sixty to two hundred and forty-seven. In Connecticut the dry towns decreased from ninety-six to eighty-seven, out of one hundred and sixty-eight in the state, and the dry towns did not include any large towns.

As against ten states showing decreases in the number of dry counties there were seven states showing increases. The largest increase was in Michigan where the number rose from one in 1908 to fifty in 1911, and decreased to thirty-three in 1914. By 1915 a little less than a third of the saloons of Michigan had been closed under local option. By the time state prohibition went into effect in 1918 forty-five of the eighty-three counties had voted out the saloon, but there remained 3,285 saloons and 79 breweries which did not hesitate to sell liquor in so-called dry territory, wherever they could find purchasers.

The next largest increase was in Virginia where the dry counties increased from fifty in 1908 to sixty-six in 1914. But here the increase in dry counties was accompanied, in the later years of local option, by an increase in saloons in the state as a whole. In 1910 there were about six hundred saloons in the state. In 1911 there were about six hundred and eighty saloons and one hundred and sixty-four other liquor centers, including sixty hotels, sixteen social clubs, fifty-three distilleries, ten breweries, fourteen wholesale liquor dealers and eleven dispensaries, making eight hundred and for-

Petitioner's Exhibit No. 31—(Continued)

ty-four in all. In 1914, when the state-wide prohibition election was held, there were nine hundred and fourteen liquor licenses, the increase having been due probably to the larger concentration in the wet centers and the expansion of the liquor traffic in the centers where licensed.

In Florida the dry counties increased from thirty-five to thirty-seven; in Arkansas, from fifty-eight to sixty-three; and in Texas, from one hundred and fifty-two to one hundred and seventy-three out of two hundred and forty-nine. But in none of these states was local option a step to prohibition, as all these defeated state prohibition in this period; Florida, in 1910; Texas, in 1911, and Arkansas, in 1912.

Furthermore, in Texas the number of dry cities having a population of over 10,000 fell from twelve in 1911 to six in 1914.

Maryland and Nebraska made small gains, the former from ten counties to thirteen, and the latter from twenty-one to twenty-nine, falling again in 1915 to twenty-seven.

Idaho was practically the only state which made a decided step toward state prohibition. There the number of counties increased from fifteen to twenty-one out of thirty-three. Idaho was a young, progressive, western state with a unique record. Starting without any local option law and known as all saloon territory in 1909, it advanced to statutory prohibition in 1915, with every political party in in the state supporting prohibition by party platform. In 1916 it placed prohibition in the state constitution by a vote of 90,576 to 35,456.

Petitioner's Exhibit No. 31—(Continued)

The brevity of the period with which they stopped with local option indicates that the splendid people of Idaho, as well as the better citizens in the other states, were not seeking merely local option, but they were earnestly seeking to be rid of the whole liquor traffic. The movement in Idaho was primarily a prohibition movement hindered, for a short time only, by local option due to the fact that at first the Legislature compromised on local option when the people wanted prohibition. In other words, local option was a compromise by the Legislature of 1909, but the people were not satisfied with that and they kept up the fight until they committed all the political parties to the principle and secured prohibition.

In five states the number of dry counties remained the same. In one the number went up and then down, and the rest of the states were either prohibition states or where the laws were of little importance.

From this survey the conclusion is inevitable that the effect of local option as a step to state prohibition, prior to the time of the concerted movement toward national prohibition, was negligible. [746] Local option as a method had reached its maximum and was beginning its decline prior to 1914. The predominant trend in the local option states was in the direction opposite to prohibition.

3. The step away from prohibition was still more accentuated in the cities.

Petitioner's Exhibit No. 31—(Continued)

Of the thirty-one cities in the non-prohibition states having a population of over 25,000, which at some period between 1908 and 1912 were under local no-license, only twelve were able to maintain a continuous no-license policy until 1914. Nineteen of the thirty-one swung back to the saloon. Three of them subsequently oscillated back again to no-license, but sixteen of the thirty-one remained wet until state or national prohibition was achieved.

The striking fact is that, outside of Massachusetts, only three cities of over 25,000 in all of the non-prohibition states of the whole country maintained a no-license policy for any length of time.

These three were Berkeley and Pasadena in California and Shreveport in Louisiana. Of these, Berkeley and Pasadena should not be credited to the local option method. Both were residence communities adjacent to great cities. Berkeley is the seat of the state university, around which a dry zone was established by state law, and Pasadena had never had a saloon in its history. So, outside of Massachusetts, local option can be credited with the dry policy of just one large city, Shreveport, Louisiana, with a population of 28,015, which adopted local no-license in 1910.

Of the nine Massachusetts cities most were close to Boston and all were adjacent to unlimited liquor supplies.

According to the census of 1910 there were two hundred and twenty-nine cities in the United States of over 25,000 population. Of these, including the

Petitioner's Exhibit No. 31—(Continued)

nine in Massachusetts, by 1914 there were just ten dry as the net result of local option, after all the years of labor in its behalf. At the same time there were twenty cities of that size in the states having state prohibition.

4. Another phase of the step theory should be considered, and that is the length of time which it took after the passage of a local option law before prohibition was secured. Note especially the record of even those states which are chiefly cited as examples of the step contention. In Georgia it took twenty-two years from the passage of the general local option law in 1885 to the adoption of state prohibition in 1907. In Mississippi it took twenty-two years, from 1886 to 1908; in Virginia, twenty-eight years, from 1886 to 1914; in Texas, forty-three years, from 1875 to 1918; in Kentucky, forty-five years, from 1874 to 1919; in Florida, thirty-one years, 1887 to 1918. In other words in almost the entire South the more appropriate characterization during a long period was that local option was a status rather than a step.

In the New England states, Massachusetts had voted on no-license every year since 1881 with no permanent progress. Connecticut had had town option for a generation with very little improvement. Other local option states never took the step. Further illustrations are unnecessary.

Foreign countries which might be misled to enter upon a step program should take these facts into consideration.

Petitioner's Exhibit No. 31—(Continued)

5. That local option as a step was not needed was demonstrated by the fact that several of the states which had not had local option of any consequence rolled up big majorities for prohibition not only in the earlier periods but also in the later period.

Arizona, with only two dry counties, adopted prohibition the first time it was submitted in 1914. Montana, with one dry county, carried prohibition in 1916 by a majority of 28,886. Wyoming and Nevada, each without a dry county and regarded as exceedingly wet, adopted prohibition by large proportional majorities the first time they had a referendum, in 1918. In Wyoming every county gave a majority for prohibition.

These states all disprove the claim that local option as a step was necessary.

6. Local option was not a step in the states which gave the largest percentage of votes for prohibition.

Of the twenty-two states adopting prohibition by popular vote in the period 1907 to 1919 there were five which gave a vote of 70 per cent or more in favor of prohibition. Of these five giving the largest proportional vote for prohibition not one was a typical local option state. Of the three having the highest percentage of prohibition votes, Wyoming, 75.2 per cent; New Mexico, 73.1 per cent, and Utah, 73 per cent, none had gone through the county option stage. The fourth, Idaho, with 71.7 per cent, has been discussed above, and the fifth, South Caro-

lina, with 71.3 per cent, was evidencing its revulsion against the dispensary system.

7. Not only was local option not a step but it hindered the attainment of prohibition because of its own inherent defects and limitations. It did not elicit the full strength of the anti-liquor sentiment. In the various popular votes that have been taken the [747]

PETITIONER'S EXHIBIT No. 32

Century Brewing Association
814 Second Avenue
Seattle, Washington

April 11, 1935.

Mr. Louis Hemrich, President
Rainier Brewing Company
1550 Bryant Street
San Francisco, California

Dear Mr. Hemrich:

I advised you verbally this afternoon that in the light of some of the objections taken to the deal as we made it in San Francisco, some of my associates were not keen to go through on that basis.

I suggested an alternative way of dealing with the problem and I am complying with your request that I submit it by letter so that you and your associates may consider the matter.

I think our company would be willing to make the Rainier Brewing Company this proposition: We

Petitioner's Exhibit No. 32—(Continued)

would buy the brewery plant at Georgetown for $200,000.00 cash provided that your company also permit us to manufacture and sell your Rainier and Tacoma brands of beer in the State of Washington and in Alaska for all time, and to have the name "Seattle Brewing & Malting Company." For this privilege we would pay your company a minimum consideration of $50,000 a year and we would be prepared to pay on a graduated basis according to barrelage whereby if we succeeded in selling say 100,000 barrels of your brands in a year, half in bottles, your royalty fees would then amount to $125,000.00 a year, say at the rate of .75c per bulk barrel when turned out in bottles and at the rate of .50c per bulk barrel when turned out in draught. In any event the scale could be so graduated that starting with the $50,000.00 minimum payment based on say 60,000 barrels, the rate of payment would go up in ratio as the production increased. Any such arrangement would necessarily entail a lesser rate per barrel if our company assumed all the risks attendant on price maintenance or collapse, on strikes and other imaginable contingencies, although any such agreement would have to provide for the possibility of prohibition or local option.

This proposition would also entail the entry of yourself and Mr. Goldie as well as Mr. Allen into our company and on our Board of Directors. We would be pleased to have Mr. Hemrich act as Chair-

Petitioner's Exhibit No. 32—(Continued)

man of the Board, Mr. Goldie to be a Vice-president and Mr. Allen of course to be our Managing Director, and likewise the manufacture and quality of Rainier and Tacoma brands to be subject to your approval.

On the above basis, we would of course be very pleased on the expiration of existing contracts to give consideration to the use of your malt largely, both here and at other plants.

Proceeding along the above lines we would accomplish all the good features of what might have been expected to accrue from the stock merger we have heretofore been considering. This alternative arrangement could furthermore be effected without any great unsettlement to either business or shareholders. I will be glad to hear after you discuss this with your associates whether you are interested. We believe some reasonable and fair constructive alliance between our respective companies carried on in a local name as suggested would prove beneficial to both interests, probably more so a great deal than our competition against each, and would also prove to be a great stabilizer to the industry in the Northwest.

Yours very truly,

/s/ EMIL G. SICK,
President. [748]

PETITIONER'S EXHIBIT No. 33

No. 13376.

Articles of Incorporation of
Rainier Brewing Company

Know All Men by These Present: That we, E. F. Sweeney, John T. Campion and L. C. Gilman, each one and all of us citizens of the United States and citizens and residents of the State of Washington, being desirous of forming a corporation for the purpose hereinafter specified, do hereby associate and incorporate ourselves together and form a corporation under the laws of the State of Washington relating to private corporations, and do make, subscribe, execute and acknowledge these Articles of Incorporation thereof:

Article I.

The corporate name of this corporation shall be "Rainier Brewing Company."

Article II.

The objects for which said corporation shall be and is hereby formed, are the following:

To own, operate and carry on breweries and manufacture and sell beer, ale, porter and other malt liquor, products, merchandise and preparations:

To own and operate ice works and manufacture and sell ice:

To own and operate bottling works and machinery, and to manufacture, bottle, pack and sell bottled liquors:

Petitioner's Exhibit No. 33—(Continued)

To own and operate cooper shops and barrel factories, and manufacture and sell barrels, casks and cooperage materials and products:

To own and operate cold storage plants and machinery, and engage in the business of cold storage:

To own and operate malting plants and machinery, and manufacture and sell Malt, Malt extracts and Malt products, preparations and merchandise:

To buy and sell, handle and deal in hops and grain, and to own and operate grain elevators:

To own and operate refrigerator cars and cars for shipping and transporting liquors and perishable products, and to manufacture and sell and deal in refrigerators and refrigerator cars:

To buy and sell, handle and deal in brewing machinery, malting machinery, ice-making machinery, cold storage machinery, cooperage machinery, bottling machinery and commodities, merchandise, materials and products used in connection with the business of brewing, malting, bottling, manufacturing ice, and cold storage.

This Corporation shall have power:

To purchase, take, acquire, accept, lease, rent, hold, own, possess, use and enjoy any and all real and personal property and any interests and estate therein which it shall deem desirable, useful, necessary or convenient in connection with its business or in furtherance of its interests, including promissory notes, choses in action, mortgages, bonds and other securities:

Petitioner's Exhibit No. 33—(Continued)

To sell, lease, rent, dispose of, grant, convey away, transfer, pledge, encumber and mortgage at any time all or any of its real or personal property and any estate or interest therein:

To borrow money, contract debts, make contracts and agreements, and assume, guarantee and obligate itself to pay, discharge or perform any debt, contract or obligation of any other person, firm, company, association or corporation, and to make promissory notes and choses in action, and to make, issue and sell negotiable coupon bonds, and for the purpose of securing the payment or performance of any note, bond, contract, debt or obligation of or assumed or guaranteed by this Corporation, to make mortgages, deeds of trust and pledges of all or any of its real and personal property:

To raise, grow, cultivate and produce, hops, barley, grain and other products used in the manufacture of beer or malt: [751]

To own and carry on boarding houses, lodging houses, mess-houses and stores, and to buy and sell and deal in goods, wares and merchandise:

To own, lease, use and carry on wharves, docks and storage houses:

To own, lease, maintain and carry on saloons, and buy and sell wines, liquors and cigars, and to buy and sell saloon and bar fixtures and fittings:

To have and enforce a lien for the payment of such indebtedness upon the shares of its capital stock owned by any person who may be in any man-

Petitioner's Exhibit No. 33—(Continued)

ner indebted to the Corporation, and to prevent the transfer of such shares until such indebtedness be paid:

To loan and invest any of its moneys or funds, and to take, own, hold, collect and enforce promissory notes, choses in action, bonds, mortgages and securities, and to sell, transfer, and dispose of the same:

To take, own and hold and sell, transfer and dispose of shares of the capital stock of any other company or corporation:

And, generally, to do and perform any and all acts and things which are germane to or which will tend to aid and accomplish the purposes of its incorporation and promote its interests.

Article III.

The amount of the capital stock of this Corporation shall be five hundred thousand dollars ($500,000.00), and it shall be divided into five thousand (5000) shares of one hundred dollars ($100.00) each.

Article IV.

The duration and time of existence of this Corporation shall be fifty (50) years.

Article V.

The number of Trustees of this Corporation shall be three (3), and E. F. Sweeney, John T. Campion and L. C. Gilman—each [752] one and all of them being citizens of the United States and citizens and

Petitioner's Exhibit No. 33—(Continued)

residents of the State of Washington,—are hereby constituted and appointed and shall be Trustees of this Corporation and manage its concerns and affairs until the first day of February, A. D. 1904.

Article VI.

The principal office and place of business of this Corporation shall be located at the City of Seattle, in the County of King, State of Washington.

In Witness Whereof, We, the said E. F. Sweeney, John T. Campion and L. C. Gilman, have hereunto set our hands and seals this 31st day of July, A. D. 1903, in triplicate hereof.

[Seal] E. F. SWEENEY,
[Seal] JNO. T. CAMPION,
[Seal] L. C. GILMAN.

Signed, sealed and delivered in presence of
James B. Murphy
W. M. Williams.

State of Washington,
County of King—ss.

This Is to Certify, That on this 31st day of July, A. D. 1903, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn, personally came E. F. Sweeney, John T. Campion and L. C. Gilman, to me known to be the individuals described in and who executed the foregoing articles of incorporation, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

Petitioner's Exhibit No. 33—(Continued)

Witness my hand and official seal the day and year in this certificate first above written.

JAMES B. MURPHY,
Notary Public in and for the State of Washington, residing at the City of Seattle, in said State.
My Commission Expires Sept. 19, 1903. [753]

(Endorsed.)

State of Washington—ss.

Filed for record in the office of the Secretary of State Aug. 7, 1903.

Recorded in Book 39, Page 147.

Domestic Corporation.

SAM H. NICHOLS,
Secretary of State. [754]

PETITIONER'S EXHIBIT No. 38

I, F. S. Smith, do hereby certify that I am, and at the times herein mentioned was, the duly elected, qualified and acting Secretary of Rainier Brewing Company; that as such I have custody and control of the minute books of said company; that attached hereto are true and correct copies of the following:

1. The call issued by the President of said Company for a special meeting of its Board of Directors to be held July 2, 1940; and

2. The resolutions adopted said meeting.

That said call and resolutions have not been amended or revoked and are still in full force and effect.

In Witness Whereof I have hereunto set my hand and the seal of said company this 21st day of July, 1945.

[Seal] /s/ F. S. SMITH,
Secretary, Rainier Brewing Company. [773]

Rainier Brewing Company
1550 Bryant Street
San Francisco 3

July 1, 1940

Mr. F. S. Smith, Secretary
Rainier Brewing Company
705 Standard Oil Building
San Francisco, California

Dear Sir:

The undersigned, as President of Rainier Brewing Company, pursuant to the authority contained in Section 8 of Article III of the By-Laws of the Company, hereby calls a Special Meeting of the Board of Directors of said Company to be held at the principal office of the Company for the transaction of business, 1550 Bryant Street, San Francisco, California, on Tuesday, July 2, 1940, at the hour of 3:30 o'clock P.M. for the following purposes:

(1) Considering a recent proposal submitted by Seattle Brewing & Malting Company for the amendment of its contract and approving the action of the officers of this company in relation thereto.

(2) Considering, and if advisable, taking action upon any and all matters relating to the tender by Seattle Brewing & Malting Co. of its promissory notes aggregating the sum of $1,-000,000.00 for a perpetual license to use the trade names "Rainier" and "Tacoma" in the State of Washington and the Territory of Alaska and the acceptance of said notes by Rainier Brewing Company as a consideration therefor, and also authorizing, if necessary, to consummate said transaction, the execution and delivery of a Supplemental Trust Indenture to The Anglo California National Bank and Laurence W. Tharp, Trustees, supplementary to the Indenture securing the payment of the issue of $1,200,000.00 of five per cent bonds of this company.

(3) Such other business as may properly come before the meeting.

Very truly yours,

/s/ JOSEPH GOLDIE,
President, Rainier Brewing Company.

:GD [774]

Resolutions Adopted at Special Meeting of Board of Directors of Rainier Brewing Company Held on Tuesday, July 2, 1940

Resolved, that the action of the officers and Executive Committee of and counsel for, this corpora-

tion in refusing to accept the offer of Seattle Brewing & Malting Company, made through its attorney, Stephen F. Chadwick, for the amendment of the Agreement of April 23, 1935, between Rainier Brewing Company, Inc. (predecessor of this corporation) and Century Brewing Association, now known as Seattle Brewing & Malting Company, so as to provide for the payment of $400,000 in cash before January 2, 1941, and the execution and delivery by Seattle Brewing & Malting Company to this corporation of promissory notes for the sum of $600,000, payable over a period of five years in consideration of this corporation granting to Seattle Brewing & Malting Company perpetual license to manufacture and sell its products under the trade names of "Rainier" and "Tacoma" in the States of Oregon and Idaho without further consideration or payment of royaltes, be, and the same is hereby fully approved, ratified and confirmed; and

Be It Further Resolved, that the officers of this corporation be, and they are hereby, fully authorized, empowered and directed to give consent on behalf of this corporation to the acceptance by The Anglo California National Bank of San Francisco of the five promissory notes, each for the sum of $200,000 and aggregating the principal amount of $1,000,000, tendered by Seattle Brewing & Malting Company, pursuant to the terms of Paragraph Thirteenth of the Agreement of April 23, 1935, between Rainier Brewing Company, Inc. (predecessor of this corporation) and Century Brewing Association, now known as Seattle Brewing & Malting Company, sub-

ject to the advice of counsel for this corporation as to the legality of the transaction and of said promissory notes. [775]

Resolved, That the officers of this corporation be, and they are hereby fully authorized, empowered and directed to make, execute and deliver to The Anglo California National Bank of San Francisco and Laurence W. Tharp, Trustees, under that certain Indenture dated as of September 15, 1937, between Rainier Brewing Company, Inc. (predecessor of this corporation) and The Anglo California National Bank of San Francisco and Frank H. Lougher, Trustees, to secure payment of an authorized issue of $1,200,000 First Mortgage and Collateral Trust 5% Serial Bonds, a Supplemental Indenture in such form as shall be required and as shall be approved by said officers and counsel for this corporation, relating to the deposit with said Trustees of five promissory notes of Seattle Brewing & Malting Company, each dated July 1, 1940, and each for the principal sum of $200,000, payable respectively on or before one, two, three, four and five years after the dates thereof with interest at the rate of 5% per annum. [776]

PETITIONER'S EXHIBIT No. 41

John F. Forbes & Company

San Francisco, October 15, 1942.

Memorandum:

In re: Rainier Brewing Company

We have been asked to determine the fair value

Petitioner's Exhibit No. 41—(Continued)

as of March 1, 1913, of the trade name "Rainier" applied to the beer manufactured and sold in the State of Washington by the Seattle Brewing and Malting Co. Our study of the general problem of goodwill evaluation and of the affairs of this specific company and those of its predecessor company, Seattle Brewing and Malting Company, leads us to the conclusion that a fair and equitable value for the goodwill attaching to that trade name at the given time and place is $1,355,592.03.

(1) The first step in determining the goodwill value of the name Rainier beer is to calculate the total goodwill value of the company manufacturing and distributing this product. This total figure will be a composite of (a) the goodwill of the trade name Rainier beer in so far as that contributed to the profitability of the company and (b) all other goodwill elements enjoyed by the company.

The concept of commercial goodwill is a commonplace of modern business practice. Goodwill is fundamentally a convenient term for describing the habit-creating power of a business enterprise. Persons are led for various reasons to buy a certain branded product. They find this product satisfactory and continue to buy it, specifying it by brand name. The purchase of this item becomes a habit. The sum of the purchasers' habits becomes the basis of the goodwill of the manufacturer of the article in question. This habit-causing faculty is recognized to possess a very real monetary value.

Petitioner's Exhibit No. 41—(Continued)

Goodwill of a business enterprise is evaluated, according to standard accounting procedure, by capitalizing the profits of the concern which are in excess of a normal return on the money invested in the assets used in ordinary operations.

The application of the excess profits formula to the earnings of the Seattle Brewing and Malting Co. in the State of Washington for the five years ended June 30, 1912, gives the following schedule:

Average earnings for five years ended June 30, 1912	$ 315,077.29
Interest at 8% on $1,792,979.80, the invested capital	143,438.38
Excess earnings	**$ 171,638.91**
Capitalization at 12½%	$1,206,213.36

The percentages used in this calculation of 8% as a normal return on the investment and 8 years' purchase as the rate of capitalization are based upon an examination of the earnings record of the Seattle Brewing and Malting Co. From these figures (Appendix A), we gain a clear picture of a stable business with steadily rising profits and every reason for the expectation of an indefinite continuation of this favorable situation.

(2) The second step in determining the goodwill value of the trade name Rainier beer is to eliminate from the figure $1,206,213.36, just calculated, all contributions to the excess profits of the Seattle Brewing and Malting Co. made by factors other than the trade name Rainier beer. The remainder

Petitioner's Exhibit No. 41—(Continued)
will be the goodwill value of the trade name to the extent that that was reflected in the excess earnings of the company.

It frequently happens that the manufacturer submerges his own identity and that of the company in advertising and publicizing a branded product. The result of this policy is that the full measure of the company's goodwill accrues to the trade name of that product. Discussing this situation, J. M. Yang says (Goodwill and other intangibles, their significance and treatment in accounts, N. Y., Ronald Press, 1927, p. 61) "* * * The mark or name which becomes the necessary channel for the conveyance of goodwill in the advanced stage of business development may become the direct object of value."

This is well illustrated in the case in point. From the outset of its operations, the Seattle Brewing and Malting Co. advertised the name of its product, Rainier beer, at great cost and made no attempt to build up a separate goodwill value for the company. The reason for this emphasis on the trade name is clear. [781] Rainier beer was widely known before the Seattle Brewing and Malting Co. came into existence. By March 1, 1913, Rainier beer had been sold in Washington uninterruptedly for fully 30 years. The name had outlived two companies and was being used profitably by the third successive company since the 1870's.

It might be noted parenthetically that in 1942 the benefits of the name Rainier beer are being enjoyed in Washington by the sixth successive con-

Petitioner's Exhibit No. 41—(Continued)

cern to acquire this valuable intangible property.

The advertising policy of a manufacturing company is only one factor contributing to its goodwill. In this case, only the good name of the product benefited by advertising. Other factors listed in accounting treatises which should be considered in determining the company's separate goodwill are: (a) The company's reputation for honesty and fair dealing. (b) The unusual devotion of both management and employees to the best interests of the customers. (c) The enjoyment of a monopoly position in the trade. And (d) The occupation of particularly advantageously placed business premises.

(a) There is no doubt as to the integrity of the Seattle Brewing and Malting Co., its officers, and employees. The question is to what extent this probity could be treated as a business asset. The morals in trade of the management could be expected to have little influence on retail purchasers of beer but under normal circumstances might greatly affect wholesale distribution. The situation which prevailed in Washington in 1913 and previous years was unusual and operated to nullify this influence. In Washington beer was distributed through a licensing system under which the brewer would set up the saloon or acquire the license of a saloon and the "captive" saloon would then dispense only the beer of the license-holding brewery. Under these circumstances any favorable relations between brewer or brewer's representative and saloon-keeper would have no effect on the sales of

Petitioner's Exhibit No. 41—(Continued)

beer. Their interests would be identical regardless of their mutual regard or esteem. There would be no opportunity for favoring one wholesaler to the prejudice of others.

(b) As indicated above, no amount of esprit-de-corps and readiness to perform special services for wholesale purchasers by officers or employees of the Seattle Brewing and Malting Co. would [782] have any great influence on the company's dealings with its "captive" outlets. The latter were committed by self-interest to push sales of the company's product.

(c) The liquor trade in Washington was highly competitive during the period in question. Seattle Brewing and Malting Co. did not enjoy a monopoly position in regard to beer sales. Two readily recognized brands sold in competition with Rainier were Tacoma and Olympia beer.

In this connection it is significant to note that while the company did not have a monopoly of the beer market, it did have a monopoly of Rainier beer manufacture and distribution and on this fact, its prosperity depended. This statement sounds almost too obvious but as an expression of the economic doctrine of "monopolistic competition" it has important implications. The owner of a valuable goodwill property like Rainier beer enjoys a highly advantageous position amounting to a monopoly of a certain sector of the market. His habitual customers are just as unavailable to his competitors as they would be if he were the only concern produc-

Petitioner's Exhibit No. 41—(Continued)

ing the article sold. This advantage in the case of Rainier derived exclusively from the ownership of the widely known trade name. All the energies of the company's promotional and advertising staff were devoted to the development of this very quasi-monopoly.

(d) There is no evidence to indicate that the saloons selling Rainier beer exclusively enjoyed consistently favorable locations.

It has already been pointed out that the liquor business in Washington was highly competitive. In heavy beer-consuming sections there might be saloons on all four corners of a given street intersection, each selling the beer of its license-holder. The advantage enjoyed by the saloons selling Rainier beer was not one of location but, as noted above, of possessing the exclusive right to sell Rainier beer.

It must be admitted that the Seattle Brewing and Malting Co. did occupy a strategic location for the manufacture and distribution of beer within the State of Washington in competition with breweries operating outside of the State. This advantage derived from the very fact that the company conducted its operations within the State and was no greater than that possessed [783] by its intra-State rivals. Conversely, Seattle Brewing and Malting Co. suffered from its geographical position in its out-of-State business.

There is no suggestion in the foregoing analysis that the value of the Seattle Brewing and Malt-

Petitioner's Exhibit No. 41—(Continued)

ing Co. divorced from the trade name of its product would have sunk to the salvage value of the plant. On no account need this have followed. The calculations shown in Section (1) above are predicated on the assumption that the given management and plant could have continued indefinitely to earn the very substantial return of 8% on the investment in the tangible assets.

It has been shown that the accepted goodwill factors did not contribute in any way to the earnings of the Seattle Brewing and Malting Co. above and beyond the normal return to be reasonably expected by an average business concern. It follows by process of elimination that the excess profits were earned by the trade name Rainier beer and therefore the total value of the capitalized excess profits, $1,-206,213.36, applies to that trade name.

(3) The third step in determining the goodwill value of the trade name Rainier beer is to ascertain what value, if any, accrued to the name which is not included in the calculations of the first step (i.e. which did not necessarily contribute to the excess earnings of the Seattle Brewing and Malting Co.). This value should then be added to the valuation figure already determined for the trade name Rainier.

One factor augmenting the already high transferable value of the trade name is found in the extraordinary advantage enjoyed in the beer market by the owner of a well-known trade name for his product. Perhaps the greatest single difficulty en-

Petitioner's Exhibit No. 41—(Continued)

countered in the brewing business is the difficulty of breaking into the market for the first time. The newcomer finds an undue weight of sales inertia to overcome at the outset, primarily because of the tendency of the public to continue in its old well-established habits.

The value of an established trade name is, in effect, a minimum demand value. It is a virtual guarantee that a certain volume of business can be expected.

The minimum demand value of the name Rainier was undoubtedly a major factor in the hire and subsequent purchase of the name in 1935-37 by the Emil Sick organization when they were entering the brewery business in the State of Washington. [784]

No formula exists to measure the value of this aspect of trade name goodwill. Its monetary value can only be determined at the time of sale by the operation of the respective bargaining power of buyer and seller and even then extraneous factors tend to enter. This element of goodwill value could very easily persist even if there were no excess profits and might conceivably still obtain if the company were operating at a loss.

In the present case, there are two possible treatments of this type of goodwill: (a) An estimated value of $300,000.00 may be ascribed to this minimum demand value. (b) The undetermined value of the minimum demand may be set off against some equally undetermined and intangible factor or combination of factors which might tend to reduce the

Petitioner's Exhibit No. 41—(Continued)
goodwill value of the trade name Rainier beer already calculated.

From the subsequent discussion it will be readily seen that the former alternative is the more appropriate here since no comparable adverse factor appears to force down the goodwill value. This brings the goodwill value of the trade name Rainier beer on March 1, 1913, before deductions, to a total of $1,506,213.36.

(4) The fourth step in determining the goodwill value of the trade name Rainier beer is to find out whether there were any factors tending to reduce the value so far determined $1,506,213.36, $1,206,-213.36 plus the minimum demand value $300,000.00). These should be evaluated and deducted from the valuation figure.

Two possible factors might be suggested in this connection: (a) The potential threat of local prohibition in Washington on March 1, 1913. (b) The fact that the Seattle Brewing and Malting Co. carried on part of its business outside of the State of Washington and might have developed goodwill for Rainier beer in the course of so doing which would have to be subtracted from total goodwill to determine the value in Washington.

(a) It might be contended that the goodwill value of the name Rainier beer was impaired on March 1, 1913, by the potential threat of local prohibition.

It is an easy thing for us in 1942 to look back with the wisdom of hindsight and point out that in

Petitioner's Exhibit No. 41—(Continued)

the spring of 1913 local prohibition was only three years off in the State of Washington. [785] It is likewise easy to proceed from that point and assert that if there was not a general realization of the imminence of local prohibition at that time there ought to have been!

Such a line of reasoning is an oversimplification of the true situation. There is no need to look for contemporary evidence that local prohibition was going to go into effect. We know that already. What does apply to the discussion is evidence as to whether a considerable number of rational persons living in Washington on March 1, 1913, thought it was soon to go into effect or not.

Considerable weight must be attached to the reactions and behavior of the Seattle Brewing and Malting Co. in contemplation of the threat of prohibition. The management of this concern was in the hands of a prudent and conservative group not given to deluding themselves or running unnecessary risks in the operation of a $5,000,000.00 business. The officers of the company were quite aware of the talk then current about local prohibition. Agitation of this sort had been a threat to the liquor business ever since the Civil War. There was nothing in either the tone or volume of the demands of the drys on March 1, 1913, to suggest any greater cause for alarm than heretofore. Accordingly, in the course of the fiscal year ended June 30, 1913, the management of the Seattle Brewing and Malting Co. authorized the expenditure of $128,050.72 on

Petitioner's Exhibit No. 41—(Continued)

permanent plant improvements. It happens that the outlay was largely justified by the earnings of the years 1913, 1914, and 1915, but it would hardly have been incurred had local prohibition appeared imminent.

Significant as the reactions of a specific concern obviously are, a broader basis should be found for generalization. This raises the problem of how to find out what went on in the minds of a large body of persons thirty-odd years ago.

Some sort of questionnaire sampling method might be attempted. An objection to this is that with the normal human life span as brief as it is a great many of the persons who were of an age to be concerned with the prohibition question in 1913 are no longer available for questioning in 1942. A second objection is that it is not easy to remember what one thought thirty years ago. Zealots in both the wet and dry parties might recall their thoughts but they should be eliminated at the outset as unreliable since they were probably wishful thinkers in 1913. [786]

The method we have followed in attempting to sample public opinion on March 1, 1913, as to the imminence of local prohibition at that time is to consult the files of four representative Washington newspapers of general circulation. We have engaged research assistants to examine the editorials and the news stories of the Seattle Post-Intelligencer, the Seattle Time, The (Tacoma) Daily Ledger and the Daily Olympian (Olympia) for

Petitioner's Exhibit No. 41—(Continued)

every day of the years 1912 and 1913. The persons who conducted this survey were not informed of the purpose of their researches or the desirability of certain findings or otherwise prejudiced in advance in any way.

Their findings reveal that during the period in question the matter of state-wide prohibition was at no time a burning issue. Neither editorials nor news stories reflect more than tepid interest in the question in metropolitan Seattle. In the representative provincial centers of Tacoma and Olympia, the general issue was likewise a subject of minor concern. Only in the months of September, October and November, 1912, is any interest displayed in the liquor question and in those months our sources show that the interest was centered in the local option controversies in the outlying towns.

Our research people compiled statistics of the actual number of times the subject of local option or prohibition appeared in the newspapers. These figures are appended to this report, together with the resulting graphs (Appendix B). The most obvious facts shown by these monthly frequency distributions are: (a) The relatively few times the subject of prohibition is mentioned at all. (b) The interest shown in the local option elections in the fall of 1912. And (c) the particularly few references to the matter in the months around March 1, 1913.

It must be further noted that even the scanty references recorded include articles dealing with local option which had already gone into effect. This means that the question of complete state-wide pro-

Petitioner's Exhibit No. 41—(Continued)
hibition was even less in the public mind as reflected by the press than appears from the tables.

We conclude from this survey that the real agitation for state prohibition in Washington did not begin until after March 1, 1913, and there is no indication whatever that state prohibition was generally thought to be on its way at that date.

No deduction should be made from the goodwill value of Rainier beer because of the threat of prohibition. [787]

(b) The Seattle Brewing and Malting Co. earned the bulk of its profits within the State of Washington but a certain share was realized on sales outside of the State. Whatever goodwill was enjoyed by the company as the result of its out-of-State sales of Rainier beer should be deducted from the total goodwill value of the trade name.

The books of the Seattle Brewing and Malting Co. show an average net income within the State of Washington for the five years ended June 30, 1912, of $315,077.29 and a net income from out-of-State sales for the same period of $67,941.62. This means that 17% of the company's earnings were derived outside of Washington.

It might at first appear that the total value already calculated should be reduced by that percentage.

That reduction would rest on the assumption that the excess profits earned by Seattle Brewing and Malting Co. as the result of their use of the trade name Rainier beer were the same outside and inside

Petitioner's Exhibit No. 41—(Continued)

the State. The records reveal that this was far from being the case.

Here again, there is danger of oversimplifying. There can be no doubt that the goodwill value of the trade name Rainier beer was appreciably higher within its home State than elsewhere. It would be going too far, however, to say that Rainier beer had no goodwill outside and dismiss the entire question of an appropriate reduction of the total goodwill value. Rainier beer was not the cause of excess earnings outside of Washington but it still enjoyed a minimum demand potentially saleable to a new company entering the market.

Before attempting an evaluation of out-of-State goodwill we should note the factors leading to a disproportionately great intra-State goodwill. These are, in the order of their importance: (a) The geographical location of the plant already noted with the advantages of short haul distribution. (b) The many years' head start Rainier beer had in competing with concerns from outside. (c) The devotion of the greater proportion of its energies to advertising and building up trade inside of Washington, and (d) The action of local pride and the "buy at home" viewpoint. [788]

These constitute a formidable advantage for the company in its intra-State operations and the converse of (a) and (d) worked to its disadvantage outside.

Petitioner's Exhibit No. 41—(Continued)

The question of how much to evaluate the out-of-State goodwill brings us to another situation where arbitrary values must be given. Certainly, the upper limit of this value could not reach the 17% mark while the lower limit might easily fall below 5%.

A reasonable share of the total goodwill to be attributed to out-of-State business might well be 10%. Ten per cent of $1,506,213.36 is $150,621.33, leaving a final value for the trade name Rainier beer within the State of Washington on March 1, 1913, of $1,355,592.03.

Conclusion:

"The proof of the pudding is the eating."

The test of goodwill value is the amount it will realize when sold.

In 1935, the trade name Rainier beer was assessed by the Emil Sick organization at $1,000,000.00 and two years later, it was purchased by them at that figure.

The circumstances linking the 1913 value of the trade name with its 1935 value are briefly as follows:

Seattle Brewing and Malting Co. continued to realize substantial earnings through the year 1915 but in the following year local prohibition was adopted in Washington and this was superseded in 1918 by national prohibition. This legislation was ruinous to the brewing industry. The profits of Seattle Brewing and Malting Co. disappeared. Prohi-

Petitioner's Exhibit No. 41—(Continued)

bition in Washington lasted for eighteen years. During that time the company went through a reorganization.

In 1933, prohibition was repealed and the new company, Rainier Brewing Co., began the manufacture and distribution of Rainier beer. Rainier beer had not been sold for eighteen years but so favorable was the reputation of this beer that the demand for it survived the dry years. The new company began immediately to do a very large business manufacturing and selling Rainier beer. Two years later with the signing of the Sick contract the goodwill value of the trade name was determined, as noted above, to be $1,000,000.00. [789]

The goodwill value of the name Rainier beer in 1935 was patently much less than it had been during the years of consistently increasing prosperity before prohibition. The whole picture was more favorable for the company in every way in 1913. From this, it is obvious that the minimum value of $1,355,592.03 which we have determined to apply on March 1, 1913, errs, if at all, on the side of conservatism.

Appendices

A. Table of net earnings, 1908-1912.

B. Table showing the number of references to local option and State prohibition in Washington in 1912 and 1913 compiled from newspapers.

Graph based upon these statistics. [791]

Petitioner's Exhibit No. 41—(Continued)

APPENDIX A

Table of Net Earnings, 1908-1912:

Year	Total net income	Net income from State of Washington	Net income from outside of Washington	Percentage of net income from outside of Washington
1908......	$ 371,015.65	$ 292,353.40	$ 77,662.25	20.932%
1909......	334,704.47	298,387.80	36,316.67	10.850%
1910......	341,244.24	303,160.48	38,083.76	11.160%
1911......	403,144.56	326,880.82	76,263.74	18.917%
1912......	464,985.62	353,603.94	111,381.68	23.954%
Total......	$1,915,094.54	$1,575,386.44	$339,708.10	17.738%
Average	$ 383,018.90	$ 315,077.29	$ 67,941.62	17.738%

Petitioner's Exhibit No. 41—(Continued)

APPENDIX B:

Tables Showing the Number of References to Local Option and State Prohibition in Washington in 1912 and 1913 Compiled from Four Leading Newspapers by Months:

1912	Seattle P. I.		Seattle Times		Tacoma Ledger		Olympia Olympian		Total		Grand Total
	News	Editorial	News	Editorial	News	Editorial	News	Editorial	News	Editorial	
Jan.	1		2		5	1	2		10	1	11
Feb.	1		3		1	1	1		6	1	7
Mar.	2		4	1			1	1	7	2	9
Apr.			7	1	6	1	2		15	2	17
May		1	2		5		5		12	1	13
June			1		4		3		8		8
July	2		5	1	5	2			12	3	15
Aug.			5		9		2		16		16
Sept.			9		22		8		39		39
Oct.	8		2	1	3		14	1	27	2	29
Nov.			2	2	27		7	3	36	5	41
Dec.	3		2		9		1		15		15

Petitioner's Exhibit No. 41—(Continued)

1913	Seattle P. I.		Seattle Times		Tacoma Ledger		Olympia Olympian		Total		Grand Total
	News	Editorial	News	Editorial	News	Editorial	News	Editorial	News	Editorial	
Jan.	2				3		3		8		8
Feb.	2		5				3		10		10
Mar.	1		2		1		1	1	5	1	6
Apr.			1		6				7		7
May			1		5		1		7		7
June	3		2	10	2				7	10	17
July	1		1		2				4		4
Aug.		1		1						2	2
Sept.	2		2	2	2		3		9	2	11
Oct.	6				6		1		13		13
Nov.	3		1		2				6		6
Dec.	7		2	1	9		3		21	1	22
Total	44	2	61	20	134	5	61	6	300	33	333

RESPONDENT'S EXHIBIT B

—1,500,000 live in saloonless territory. There are ninteen incorporated cities in the State—eight cities are "dry." Of the 161 incorporated towns, 145 are "dry."

Two years ago the Anti-Saloon League endeavored to secure a state-wide enabling act from the legislature which would have allowed the people of the State to vote on the question of state-wide prohition; only twelve out of forty senators voted for the measure.

The legislature will again be asked to pass an "Enabling Act" at the next session, January, 1912. The measure will secure a much larger number of votes in the senate than it did two years ago, and is likely to secure a majority. The house will pass the bill without question. A fair expression will show Virginia "dry" by a good majority.

WASHINGTON

The local option law of Washington, which provides for a vote on the liquor question in towns, cities and the unincorporated portions of counties as separate units, has been in operation since 1909. Thus far 129 elections have been held; eighty-four of these elections have resulted in "dry" victories, while forty-five have resulted in "wet" victories. As a result of these elections 360 saloons have been abolished and 71 per cent of the area of the state has been made "dry." At the present time the

unincorporated portions of nineteen counties are without saloons, four counties are entirely "dry" and seventy-one municipalities, including fifteen county seats, are under no-license.

There are more people living in "dry" territory in the State of Washington at the present time than the entire population of the State numbered in 1900.

Most of the railroads have discontinued the sale of intoxicating liquors and the steamboat companies are rapidly following the example of the railroads.

Between 1,400 and 1,500 saloons are operating in all parts of the State. The saloons of Seattle are confined by a city ordinance to a very small portion of the city's area.

One of the most important and far-reaching decisions of the State Supreme Court in recent years is that just handed down in the case of State vs. Falkenstine.

Falkenstine, as steward of the steamboat "Kennedy," plying between Seattle and Bremerton, conducted a bar on the boat without having a license from the Kitsap county authorities. Twice convicted, he appealed to the Supreme Court, which conviction was affirmed, the court holding that it was necessary not only to have paid the $25 license fee to the State and the $25 tax to the United States, but also to secure a license from the county commissioners.

The significance of this decision will be much more apparent when it is understood that it will compel every steamboat plying [802] on any of the

waters within the State and every dining and buffet car within the State to have a city, town or county license for each and every city and county within which sales are attempted to be made. The defendant argued that such a conclusion practically meant the prohibition of the sale of liquor on dining cars and steamboats, but the Supreme Court said the legislature had the right and power to do this, and refused to free the defendant.

WEST VIRGINIA

The legislature of 1911 by a majority vote in both houses, submitted to the people an amendment to the state constitution providing for state-wide prohibition. This amendment will be voted upon November, 1912. The vote by which the bill providing for constitutional prohibition was passed, showed a majority of three in favor of the measure in the senate and but nine adverse votes in the house.

Thirty-nine of the fifty-five counties in West Virginia are without saloons. The total "dry" area of the State is 21,983 square miles, the "wet" area being only 3,270 square miles. The population of the "dry" territory of the State is 889,196, while the population of the "wet" territory of the State is 321,878.

The present anti-liquor laws of West Virginia leave the liquor question in the hands of the municipal councils and the county courts. The exclusive power of granting saloon licenses, however, is in

the county courts, according to a recent decision by the State Supreme Court, as a result of which Point Pleasant, West Virginia, which for many years has been a liquor strong-hold, is now under no-license.

WISCONSIN

The last legislature in Wisconsin defeated the county option measure but passed a number of good restrictive measures, among which may be named the one forbidding the sale of intoxicating drinks at public auctions, another forbidding anyone in a state of intoxication to appear in a public place, another excluding intoxicated passengers from steam railroads or interurban trains and another prohibiting the drinking of intoxicating liquors in any smoking car, parlor car or day coach of any train.

Under the municipal local option law considerable territory has been made "dry." Some 860 communities, towns, villages and cities, are without saloons, and more than 600,000 people live in no-license territory. Milwaukee has 2,138 saloons. There are about 8,415 saloons operating in the entire State.

In 1904 fewer than 300 places were "dry," so that the "dry" territory of the State as well as the population living in "dry" territory has more than doubled in eight years. Fifty-five per cent of the area of the state is under no-license. The main

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AIMING AT NATIONAL PROHIBITION

We have time and again pointed out to our members that the Anti-Saloon League was aiming at National Prohibition under the make-shift of local option. Elated over the passage of the Webb bill, it has at length frankly declared its purpose. That such program meets with full sympathy in the general body of temperance extremists is clearly evident from the following editorial expressions in the Michigan Christian Advocate. Under the caption "Amend the Constitution Once More," this paper states:

"Whether the Webb-Kenyon anti-shipment liquor bill, which is now federal law, be found constitutional or not, and whether, in its present form, it will be effectively enforced or not, it may be well for the temperance people of the United States immediately to inaugurate a movement to amend their Constitution prohibting utterly the manufacture and sale of intoxicating liquors throughout the nation.

"We understand that the Anti-Saloon League of America has already declared itself in sympathy with this idea, and no doubt other temperance organizations would gladly do so.

"The fight to secure an amendment to the Constitution would, however, not be an easy one. Liquor is no longer a necessity, but millions of people consider it a very desirable luxury, and they would

contend with bloody vehemence against any measure to prohibit it as effectively as a federal constitutional law would do.

"But even though years, or decades, or even whole generations, should be required to carry the measure through, the educational influence of such a campaign would be wholesome from the start, and the mere possibility of reaching such a goal would be a constant inspiration to every temperance worker in the country."

Dr. Purley A. Baker, president of the Anti-Saloon League of America, has made the following official statement with regard to the "campaign for national prohibition":

"The league confines its efforts to law enforcement and sentiment-building where that is the only policy public sentiment will sustain. It is for local prohibition where that policy meets the requirements of the most advanced public demand. It always has favored the adoption of State and national prohibition just as [810] quickly as an enlightened public conscience warrants. We believe the time is fully ripe for the launching of a campaign for national prohibition—not by any party or parties, but by the people. This does not mean we are to relax our efforts one iota for law enforcement, local prohibition, and prohibition by States, but it is a recognition of the fact that the task begun more than a hundred years ago should speedily be completed. . . .

"The time for a nation-wide movement to outlaw the drink traffic is auspicious. Organization is now established and in operation in all parts of the country. The forces that definitely oppose the traffic are in accord as at no time in the past. The moral, scientific and commercial aspects of the problem are being more intelligently put before the public than hitherto. The narrow, acrimonious and emotional appeal is giving way to a rational, determined conviction that the traffic being the source of so much evil and economic waste and the enemy of so much good, has no rightful place in our modern civilization.

"We appeal to every church, to all organized philanthropies and to every individual of every race and color, who loves his country and his kind, to join in this crusade for a saloonless nation. We depend for success upon the same leader who commanded Moses to 'speak to the Children of Israel that they go forward'."

The Anti-Saloon League of America has called a national convention to meet at Columbus, Ohio, next November, whose object is to inaugurate a new campaign for the prohibition of liquor and the liquor business in the United States by means of a "dry" amendment to the Constitution.

An amendment to the Federal Constitution prohibiting the sale of liquors is now the plan of the Anti-Saloon League of America, according to a statement issued by the League of Illinois. The statement in part follows:

"A resume of the 'wet' and 'dry' situation after municipal elections of the entire nation, April 17, 1913, shows that of the 2,973,890 square miles, the saloon is now outlawed in 2,132,746 square miles. There are thirty-two States in which the combined number of saloons is less than the number in Chicago alone. 46,029,750 people are now living under no license. There are more than 500 cities having a population of 5,000 or more, and almost 200 cities having a population of 10,000 or more, in which saloons have been abolished. [811]

"If the thirty-two States in which the combined number of saloons is less than the number in Chicago alone, together with four others, ratify an amendment to the Federal Constitution, the liquor traffic in this country will be at an end. The Anti-Saloon League is laying definite plans to effect the passage of such amendment."

The conservative Independent (New York) makes this comment:

"The progress of prohibition is seen in the fact that there are now in this country more than 500 cities and towns with a population of 5,000 or more in which the sale of alcoholic liquors is forbidden, and nearly 200 of them have over 10,000 population. There are nine States with a population of nearly 15,000,000 whose people have adopted prohibition. They begin to talk of a prohibition amendment to the Constitution, but the time for that is not yet, although nearly the last law under President Taft was to aid prohibition States to prevent the introduction of the poison. And yet people still

say, what they say of the social evil, that the alcoholic evil has always existed, always will exist, and that the only way is to segregate it, localize it in poor quarters, and shut it out of the respectable residence districts."

In this connection it is interesting to notice

WHAT PROHIBITION HAS DONE FOR TENNESSEE,

according to the Nashville Democrat. That journal reads the following vigorous lesson on the moral and political evils which have attended prohibition in Tennessee:

"Tennessee has now had three years of prohibition and fusion. A little over three years ago the laws went into effect closing down distilleries and breweries, destroying the large values which had been invested in them, and extending prohibition to the large cities. Since these confiscatory and prohibitory statutes were enacted, what has happened? To what conditions has the State been reduced? The principal cities, Republican and Democratic—that is to say, Knoxville, Chattanooga, Nashville and Memphis—have been and now are "wide-open" towns. The traffic has not diminished and the consumption of liquors has increased. As a "prohibitory" measure, the statute is an acknowledged failure, and why? Because the people of Tennessee are not in favor of State-wide prohibition. They do not want these laws enforced, and therefore, they are not enforced. But while the laws are dead [812] letters, save a short, spasmodic

intervals, they have brought about conditions that were unknown under Democratic and anti-State-wide rule. There is a growing disregard for law, because men are accustomed to observe its non-enforcement. While the authorities of the cities can close the open saloon, they cannot suppress clandestine traffic, and, making the best of a bad condition, they overlook the open saloon; but the power to close an open saloon and break up the proprietor of an expensive establishment is a power that even an honest but ambitious officer can exert with tremendous political effect, and it is a power which a dishonest officer can use to suppress and to 'graft'. It is a condition which breeds the worst kinds of political machines, and the strongest of city 'bosses'."

ANTI-SALOON LEAGUE TROUBLES

The Prohibition Party has taken the field against the Anti-Saloon League. A war of extermination, with the State of Maryland as the beginning of the conflict, is shortly to be waged between these two organizations. Eugene Chafin, who is considered the ablest speaker and campaigner among the Prohibitionists, is to lead the forces under the Prohibition Party. He has selected Maryland as the beginning of his campaign. He purposes to challenge the State superintendent of the Anti-Saloon League to show cause why that organization should exist at all. In a recent statement Mr. Chafin publicly declared:

"The Anti-Saloon League of Maryland is merely an organization whose business it is to mulct money from church-going people. Similar organizations have existed in other parts of the United States. They disbanded when I got after them, and I drove their superintendents to work. Instead of living off the fat of the land, they had to leave the places in which they were operating and get a job somewhere else."

After Mr. Chafin disposes of Anderson he threatens similar campaigns in New Jersey, Pennsylvania and New York, where the League has been more or less a political nuisance. . . .

At the Detroit Methodist Episcopal Conference, held at Alpena, Mich., on September 13th, 1912, a memorial was presented, urging that body to sever all connections with the Anti-Saloon League of America. The memorial, which set forth various damaging charges against the League, was vigorously supported but failed to influence a majority of the delegates.

The Western Yearly Meeting of Friends, a church organization of Indiana, lately voted to sever relations with the Anti-Saloon League.

A DRASTIC PROHIBITION LAW

The West Virginia prohibition law, which goes into effect July 1, 1914, is the most drastic that has been written in the statutes of any State.

The word "liquors" is construed to embrace all malt, vinous or spirituonos liquors, wine, porter, ale, beer or any other intoxicating drink, mixture

or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of the act; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcoholic by volume, shall be deemed spirituous liquors.

Under the provisions of the new law private consumers of whisky or other alcoholic drinks are not permitted to have more than half a pint of such intoxicants on their premises at any time and this amount can only be obtained as medicine on a physician's prescription. Only one prescription can be filled for each examination by a physician, who must also make affidavit that the person receiving such prescription is not known to be addicted to the use of intoxicants or narcotic drugs. The new law carries with it for any violations a fine of from $100 to $500 for the first offense in addition to a jail sentence of from 30 days to 6 months. The second offense is to be prosecuted as a felony and carries a much heavier fine and penitentiary sentence of from one to five years. Clubs are not exempt and churches are permitted but a small quantity of wine for sacramental purposes.

The express companies and common carriers are restricted to the amount of liquor and alcoholic stimulants they carry into the State. The records for such transportation must be kept in separate books and open to officers of the law. These officers do not have to secure search warrants, but can

forcibly enter any building under suspicion and make an investigation. Drug stores are also included and are not permitted to import, handle or sell patent medicines containing more than one-half of one per cent of alcohol. [814]

The people of West Virginia will, however, have to pay the fiddler for their folly. Governor Glasscock calls attention to the need for additional taxes to make up the deficiency in public revenues that will follow the extinction of the licensed saloon.

The loss of liquor revenue is particularly unfortunate at this time, because of the fact that the old litigation known as the "Virginia Debt" is now in the United States Courts, and should a decision be rendered against the State of West Virginia, the amount of the judgment rendered will be somewhere from ten to twenty-five millions of dollars.

THE COLUMBUS CONVENTION

At its National Convention, held at Columbus, Ohio, in November, the Anti-Saloon League adopted a declaration of principles, from which we quote the following:

"It is wrong for the Government to accept revenue from the liquor traffic or to issue liquor or dealers' tax receipts in 'dry' territory.

"In order that Federal Legislation relating to the inter-State shipment of intoxicating liquors may be made effective, we urge upon the legislators of the various States the passage of laws prohibiting common carriers from transporting and delivering such intoxicating liquors into Prohibition territory.

"We urge Congress to enact a law forbidding the use of the mails to the liquor traffic for advertising or soliciting the purchase of intoxicating liquors in such territory.

"We declare our settled conviction that license and regulation are inadequate to exterminate the liquor traffic. The license system, instead of eliminating the evils of the traffic, has become its last and strongest fortress.

"We, therefore, declare for its national annihilation by an amendment to the Federal Constitution which shall forever inhibit throughout the territory of the United States the manufacture and sale, and the importation, exportation and transportation of intoxicating liquors to be used as a beverage."

Included in the declaration was a pointed rebuke to Secretary Bryan for his interference in the Maryland Senatorial election, expressed as follows.

"We declare it to be the sense of the League that when officials of the National Government interfere in an election in a State, the people have a right to expect them to take care that a candidate for whose election they intercede upon National issues shall not be out of harmony with the convictions of the people upon moral issues in that State." [815]

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be circulated which gives a year's time to vineyards. But this second amendment has no necessary connection and there is no guarantee that it will receive as many votes as the original amendment. But even if this concession of a year which was so grudg-

ingly given in the form of a second amendment should prevail, the time would be too short to be of any material advantage.

The Anti-Saloon people faced a practical dilemma. If they followed their best moral instincts and had the courage to oppose the present prohibition amendment on principle, they would have lost the support of every extreme and fanatical prohibitionist and would have been subject to much misunderstanding amongst their supporters. On the other hand, if they came out and supported the present drastic prohibition law they would alienate the sympathy and support of that large body of rational men who believe with them that the saloon is an evil but who are unwilling to join hands with extreme and violent prohibitionists who will hesitate at nothing, even a moral wrong, to accomplish their purposes. In this dilemma the Anti-Saloon forces have been obliged to join hands with its more extreme and aggressive supporters and to sacrifice to some extent a great body of sympathizers who cannot follow them in this extreme program.

The question which this amendment presents to the California voter is not the right or wrong of prohibition as a principle; to present it as such is sophistical misrepresentation. The amendment is in itself immoral and it does not deserve and it will not receive the support of those prohibitionists who are unwilling to serve their cause, if, indeed, it be service, in the long run, by dishonorable means.

STATE WIDE PROHIBITION IN CALIFORNIA

By S. W. Odell

President of the California Dry Association

People who really believe in temperance today are agreed that there is but one remedy for the evils of intemperance. That remedy is the total destruction of the liquor traffic. A man is a "dry" or a "wet" as he lines up on this one issue—if he believes in the prohibition of the manufacture, the sale, the giving away, the transportation and the importation of alcoholic liquors to be used for other than medical or mechanical purposes, he is a "Dry"; if he argues against this plan, he is at once dubbed "Wet". It is not now a question of political party. All the prohibition fights ever won in the United States have been won by a non-partisan or omni-partisan campaign. Parties have endorsed the movement in various states. The prohibition party has been a teacher and a preacher and has won its victories indirectly. Perhaps the organizaton to which most of the success in anti-liquor campaigns is due is the Women's Christian Temperance Union, whose constant efforts have been directed toward having scientific temperance taught in schools. The Anti-Saloon League has accomplished wonders in local option and state-wide fights. Good Templar lodges have been constantly at work. The churches, with two or three exceptions, have fallen into line and are fighting for the total destruction of the

traffic. Public sentiment has so crystallized that a wave of prohibition sentiment is rolling over the country and more than half of the United States is "dry". It is predicted that within six years the United States will adopt an amendment to its Constitution, totally prohibiting the traffic.

LICENSE INEFFECTIVE

The object of all legislation should be to stop the evils of alcoholism, not to trim it up and make it respectable. The more respectable an evil thing is made, the more attractive to man it is. This holds true with regard to every passion. Nor can the object desired be obtained by limiting the number of saloons in a city. Just as much liquor can be and is sold in one or two places thus given a monopoly as in a dozen. Segregating the saloon in certain prescribed portions of a city does no good but rather is an evil; for then the householder who will not endure the saloon in his neighborhood [822] shuts his eyes to the evils it does and thus fortifies its position with the public.

The sole object of true temperance legislation should be to stop drinking. In order to do that, it must strike at the source and stop the manufacture of it. In order to make effective "dry" laws it must stop the importation as well as the manufacture. Alcohol is a poison just the same as opium, cocaine and other deadly drugs and the law must deal radically with it. No halfway measures will accomplish anything worth while.

DOES PROHIBITION PROHIBIT?

That is the question over which many well-meaning voters stumble. It is true that in some states, where prohibition laws have been tried, it has not totally prohibited the traffic. But that was due to two main causes. First and foremost, the interstate commerce law before the passage of the Webb-Kenyon Bill by Congress permitted shipments of "wet" merchandise in original packages from one point outside of a "dry" state to the consumer inside the "dry" state. The express companies did a wonderful trade in liquors. Once the liquor was received by the consumer in the "dry" state, he could secretly distribute it to his friends and maintain blind pigs and blind tigers to the disgust of the voter who then would revert to the old license system, on the theory that it would be well to have the license money to take care of liquor's wrecks, since under the law wrecks continued. But the Webb-Kenyon law passed by Congress permits "dry" territory to forbid the importation of liquors. This will effectively stop the chief stream of liquor. Another reason was that it was found difficult to obtain juries to convict offenders against liquor laws. Some "wet" friend would almost invariably get on the jury and "hang" it. He ought to have been hung instead. Now the remedy by injunction and abatement is being used, and, as this appeals to a judge only, and judges generally regard their official oaths, it has been found effective. The proposed prohibitory amendment to the Constitution of Cali-

fornia, to be voted on November 3rd, contains provisions prohibiting importation and providing for the remedy by injunction as well as prohibiting the manufacture, sale, giving away and transportation of liquors. It is conceded by the liquor fellows that it will if enacted destroy the liquor traffic in California.

THE RIGHTS OF GOVERNMENT

Advocates of so-called personal liberty forget that in dealing with the liquor traffic we are dealing with a business the same as every municipality does when imposing a license on vehicles used in express business, or upon automobiles, or upon mercantile establishments. It is conceded that the government has a right to license the liquor traffic. In conceding such a right the opponent of prohibition concedes the right of the government to interfere with the traffic. If the government has the right to prohibit the sale of liquor, unless a man pay a certain license fee, it surely has the right to go a step further and prohibit the sale entirely, and, of course, the manufacture and transportation of liquors. No one will contend for a moment that the government has not the right to prohibit the sale of opium and the sale of cigarettes to children. Liquors are in the same class. We take the advanced step that no one has any right to be using alcoholic drinks either moderately or immoderately and thus to destroy his own efficiency, to wreck his body and mind, to produce as a consequence of his own dissipation children who are weak in body or mind, and thus

cast upon society the task of supporting the inefficient, the sick and the insane and the burden of dealing with criminals made so by alcohol. Personal "license" is the word these opponents should use instead of personal "liberty." There is absolutely nothing in such an argument.

THE RIGHTS OF PROPERTY

As to the destruction of property-values and the interference with business, our opponents are in no worse position than any manufacturing establishment affected by changes in tariff laws, for example. The burden of citizenship imposes upon all business men the necessity of surrendering their affairs to the control of the majority. The Republican manufacturer argues strenuously against free-trade laws and can demonstrate to his own satisfaction, and generally to the satisfaction of the majority, that tariff laws are better for business in his particular line. On the other hand, the Democratic statesman maintains that the tariff laws benefit only the few and can [823] demonstrate also to his satisfaction and often to the satisfaction of the majority that he is right. Whenever the majority speaks the minority must bend. Whenever we can persuade the majority that the liquor traffic, while it may be a profitable business for the few, is detrimental to the many and to society in general, then, bending to the will of the majority, the minority favoring the traffic must suffer the consequences. No business should be maintained which injures any one citizen in his health or happiness. Financial considerations

must be disregarded when weighed in the scale against the human body and the human soul.

THE CASE OF THE GRAPE-GROWERS

As to the wine-grape in California, a great noise has been made by some wine-makers and agents of the liquor traffic who are fighting California "Dry" over the grape-growers' shoulders. Some of the men who are going about trying to convince the public that a great and lucrative industry is about to be destroyed talked very differently two years ago before the "dry" campaign began. The temperance advocates have seized upon the utterances of these valiant defenders of the liquor traffic and published them in several bulletins to their utter confusion, comparing what they said and wrote two years ago with what they are saying now. What they said two years ago appears in the Bulletins of the State Commission on Horticulture, which can be found in every public library. These bulletins contain statements to the effect that the wine-grape grower is selling his grapes at cost and receiving nothing for his time and expenditure of energy; that since 1907 the average vineyards of the interior valleys have been run at a financial loss; that there must be an influx of immigration from Southern Europe if the vineyardists are to hope to compete successfully with France, Italy, Germany, Spain and Portugal in the wine markets of the world.

Reports show that for every million dollars invested in the manufacture of lumber, five hundred

and seventy-nine men are employed; for every million dollars invested in the manufacture of clothing, five hundred and seventy-eight men are employed; for every million dollars invested in the manufacture of leather products, four hundred and sixty-nine men are employed, while for every million dollars invested in the manufacture of liquors, only seventy-seven men are employed.

If the working men overthrow the traffic in liquors by their votes they will force the investment of the money now giving employment to a mere handful into channels where it will employ about five times as many men.

THE AMENDMENT

It is admitted that the contest in California will be a close one. The temperance forces are united under the leadership of the California "Dry" Federation. The initiation of an amendment fixing the time when the prohibitory law shall go into effect at February 15, 1915, so far as the sale of liquors in the state is concerned, and at January 1, 1916, so far as the manufacture and export of liquors is concerned, thus giving the laborers ample time to get new jobs and the manufacturers of wine-grape products time to change their business and investments, has made probably fifty thousand votes for the "drys" and given a new impetus to the work. One hundred days from November 3rd will be ample time for the retailers to close out and get into a better business and fourteen months will enable the grape growers to make arrangements to raise other

crops and give the breweries, distilleries and wineries time to change their buildings into warehouses, pickle, vinegar or grape-juice factories and generally to rearrange their affairs so as not to suffer much financial loss. They must get out some time and if they were given five years they would not begin to quit until almost the end of the term. It is conceded that one year is as reasonable a time as could be expected to allow an economic change for the better. [824]

THE ALLISON PEARLS

A Lanagan Story

By Edward H. Hurlburt

Author of: Lanagan Amateur Detective: The Jerroldson Case

Illustrated by Arthur Cahill

Constance Allison is socially and financially the most interesting and conspicuous figure among the merry masked dancers at a Mardi Gras ball in San Francisco. Heiress of the Allison estate, one minor asset of which is the magnificent Allison hotel where the Mardi Gras is being celebrated, she wears for the first time since her mother's death the family's most treasured heirloom, a string of priceless pearls. Suddenly she misses them from her neck and says to her escort, Sterrett Masters, "See that no one leaves the hotel!" Masters notifies the house detective, and Chief of Police Leslie himself arrives with his men. An exciting scene follows in the

hotel's private office when the Chief sharply questions Masters and Raymond Winkeppner in the presence of Miss Allison and her friend Miss Ysobel Cadogan, fiancee of Winkeppner. Throughout, Lanagan, star reporter for a morning paper, has been a shrewd observer. He decides to take a hand in the detective game, now keenly on, for the capture of the pearl thief. Meanwhile the Chief, searching Winkeppner and Masters, finds a pearl in the latter's pocket. To save Masters, whom she loves, Miss Allison denies that the jewel is hers.

THE CLOUD OF SUSPICION

Miss Allison swayed for a moment, and then sank into a chair. With a rush of quick fury Leslie stepped before her.

"Do you mean to deny that this pearl is from your necklace?" His tone was sinister and threatening. Leslie was indeed no respecter of persons. The Allison connections, financial and political, were powerful enough to bring the mighty Leslie into jeopardy with the Police Commission. A smaller-calibered Chief may well have treated the Allison heiress more considerately.

"Do you deny it?" he repeated.

She looked directly up at him and then, as her self-possession quickly returned, examined the pearl again, critically.

"I do," she repeated. "It is not one of my pearls."

At a loss for a moment for words, Leslie could only glare down upon her. He wheeled upon Masters.

"I presume you'll be denying, too, that it's one of the Allison pearls?"

Masters did not look up. The pallor on his face had given way to a painful flushing. "I cannot deny that it has the appearance of one of the Allison pearls," he said.

"Where is your cloak-room check?" Leslie's voice was sharp with the eagerness of the crime quest.

"I live in the hotel," replied Masters.

"Then where is your room key?"

Masters handed it over. Leslie tossed it to Royan. "Go search his room," he said. Masters clenched his hands. Miss Allison sprang to her feet.

"Stop!" she cried, her eyes sparkling. "This farce has gone far enough! Who are

*This story began in the September, 1914, number.

No. 11547

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RAINIER BREWING COMPANY, A CORPORATION, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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FILED

AUG 11 1947

PAUL P. O'BRIEN,
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ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 37–78) are reported at 7 T. C. 162.

JURISDICTION

The Commissioner determined deficiencies in income, declared value excess profits and excess profits taxes for the year 1940 and in excess profits tax for the year 1941 and mailed notice of the deficiencies to taxpayer on March 9, 1944 (R. 16–17). On May 12, 1944, within the permitted ninety-day period, taxpayer filed a petition for review with the Tax Court for a redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue

Code (R. 2, 5–15). The hearing was held on July 19, 1945 (R. 3), and the decision of the Tax Court was entered August 12, 1946 (R. 78–79). The Commissioner's petition for review by this Court (R. 79–84) was filed November 5, 1946 (R. 4, 84) and properly invokes the jurisdiction of this Court under Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether the $1,000,000 in promissory notes Rainier received in 1940 upon the exercise by Seattle of a licensing option constituted a lump sum royalty, and thus ordinary income to Rainier, rather than the price received for the sale of a capital asset.

2. If the $1,000,000 constituted the price received for the sale of a capital asset, whether the full amount of obsolescence of good will allowed Rainier for the years 1918 to 1920, inclusive, rather than just the amount producing a tax benefit, was "allowed" within the meaning of Section 113 (b) (1) (B) of the Code and is therefore to be deducted from the March 1, 1913, value of the trade names "Rainier" and "Tacoma" to arrive at the adjusted basis of the trade names for capital gain purposes.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 77–80.

STATEMENT

The case in the Tax Court involved four questions (R. 38) but the Commissioner has appealed in respect

of only two of them (R. 596–598), the other two being considered factual issues on which the Tax Court's findings are conclusive. The findings of the Tax Court pertinent to the two questions before this Court, which are based upon certain stipulations and oral and documentary evidence submitted at the hearing (R. 39), will be set forth below separately. If decision is in favor of the Commissioner on the first question, it will be unnecessary for the Court to consider the facts bearing on the second question.

Findings with respect to first issue [1]

The Rainier Brewing Company, the taxpayer in this case, is a corporation, organized under the laws of the State of California, with its principal office and place of business in the City and County of San Francisco, California. Its predecessor in interest, Seattle Brewing & Malting Company, was incorporated under the laws of the State of Washington in 1893. Its principal place of business was in Seattle, where it built a brewery and manufactured beer, ale, and other alcoholic malt beverages for sale under the trade name and brand of "Rainier." In 1903 a new corporation by the name of "Seattle Brewing and Malting Co." was organized under the laws of West Virginia. This corporation acquired all the assets of the Washington corporation, including the trade

[1] Except for a few preliminary facts as to Rainier's predecessors and a few omissions, the Tax Court's findings on this issue are identical to its findings in No. 11467, *Seattle Brewing & Malting Co.* v. *Commissioner*, which is to be argued immediately before the instant case.

name "Rainier," and operated the business until the end of 1915 when, because of state-wide prohibition, it stopped the manufacture of beer and ale in the State of Washington and began manufacturing these products at San Francisco, California, through its wholly owned subsidiary, Rainier Brewing Company, a Washington corporation, until national prohibition went into effect in 1920 (R. 39–40).

In 1925 Seattle and its wholly owned subsidiary, Rainier Brewing Company, were merged through a nontaxable reorganization into a California corporation known as Pacific Products, Inc., which was organized in 1925 for that purpose. This company acquired all the assets of the two former companies, which included the plants in Seattle and San Francisco, together with their assets, business, good will, trade-marks, trade names, and labels. In 1927 Pacific Products, Inc., acquired by purchase the right to use the trade name "Tacoma." Pacific Products, Inc., operated the business until 1932 when, through a nontaxable reorganization, "Rainier Brewing Co., Inc.," a California corporation organized in 1932, acquired all the assets of Pacific Products, Inc. (except certain designated assets not used in the conduct of its manufacturing business), including the trade names "Rainier" and "Tacoma." In 1937 Rainier Brewing Company, Inc., was merged into the Pacific Products, Inc., in a nontaxable reorganization, and Pacific Products, Inc., as the surviving company, changed its name to Rainier Brewing Company, the taxpayer here. (R. 40.)

For convenience and to prevent any confusion resulting from the fact that the taxpayer in No. 11467 now has the name "Seattle Brewing & Malting Company," the instant taxpayer and its various predecessors will be referred to simply as "Rainier."

With the repeal of prohibition in 1933, Rainier resumed the manufacture and sale of real beer, ale, and other alcoholic malt beverages under the trade name "Rainier." Such products were manufactured at the plant in San Francisco. The plant in Seattle was used only as a warehouse and sales office for distribution of the products in the State of Washington. (R. 41).

In view of the rapid expansion of business following the repeal of prohibition, the officers of Rainier, in about the year 1935, considered reopening the Seattle plant as a brewery. About that time, however, they were approached by a competing company in the State of Washington, known as the Century Brewing Association (hereinafter sometimes referred to as "Century" and sometimes as "Seattle"), with a view to acquiring the right to use the trade names "Rainier" and "Tacoma" in the manufacture and sale of beer in the State of Washington and the Territory of Alaska and to have the name Seattle Brewing and Malting Company[2] (R. 41).

The trade name "Rainier" had a well established and recognized value by reason of its use and devel-

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[2] In No. 11467, already referred to and entitled "*Seattle Brewing & Malting Co.* v. *Commissioner*," the Tax Court found as a fact that Rainier was approached "with the suggestion of a merger but would not sell any part of its business" (R. 39, No. 11467).

opment and Century was desirous of acquiring the right to use it in connection with the manufacture and sale of its own beer. The trade name "Tacoma" was less used and was not so valuable[3] (R. 41).

As a result of negotiations a contract was entered into between Rainier and Century on April 23, 1935, under which Century purchased certain property and equipment located in Seattle and certain personal property, and secured the right to use the trade names "Rainier" and "Tacoma" in the State of Washington and the Territory of Alaska in consideration of the payment of certain sums to be determined on a production basis or a minimum royalty specified therein (R. 41–42).

The contract of April 23, 1935 (R. 605–625), after reciting the mutual desire of Rainier to sell and Century to purchase Rainier's Seattle plant and certain personal property located in Seattle and the State of Washington, and of Century to secure by royalty contract and of Ranier to grant the right to use the trade names "Rainier" and "Tacoma," within the State of Washington and the Territory of Alaska (R. 605–607), and after providing in detail for the sale of the physical properties (R. 607–611), continues with the following provisions (R. 611)—

LICENSING AGREEMENT

> Seventh: Rainier hereby grants to Century the sole and exclusive perpetual right and li-

[3] In No. 11467, *supra*, the Tax Court found that Rainier had acquired the trade name "Tacoma" in order to prevent a confusion in the labels which carried a picture of Mt. Rainier (sometimes called Mt. Tacoma) (R. 39, No. 11467).

cense to manufacture and market beer, ale, and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade names and brands of "Rainier" and "Tacoma" together with the right to use within said State and Territory any and all copyrights, trade-marks, labels, or other advertising media adopted or used by Rainier in connection with its beer, ale, or other alcoholic malt beverages.

Eighth: In consideration of said perpetual right and license, Century agrees to pay to Rainier in cash, lawful money of the United States, a royalty amounting to seventy-five cents (75¢) per barrel (consisting of 31 gallons) for every barrel of beer, ale, or other alcoholic malt beverages sold or distributed in the State of Washington and the Territory of Alaska under the said trade names or brands of "Rainier" and "Tacoma," up to a total of one hundred twenty-five thousand (125,000) barrels annually, and eighty cents (80¢) per barrel for all such products distributed within said territory annually in excess of said amount of one hundred twenty-five thousand (125,000) barrels; provided, however, that the minimum annual amount to be so paid by Century to Rainier shall be the sum of seventy-five thousand dollars ($75,000.00), which said amount is herein termed "minimum annual royalty." Said payments shall be made in lawful money of the United States as follows:

* * * * *

Ninth: Rainier agrees that during the period of time this agreement remains in force, it will not manufacture, sell, or distribute, within the

territory herein described, directly or through or by any subsidiary company or instrumentality wholly owned or substantially controlled by it, beer, ale, or other alcoholic malt beverages, or directly or indirectly enter into competition with Century in said territory. It is understood and agreed, however, that Rainier shall have the sole and exclusive right to manufacture, sell, and distribute non-alcoholic beverages within said territory under said trade names or brands of "Rainier" and "Tacoma" and any and all other trade names or brands that it owns and desires to use.

Rainier agrees that during the period of time this agreement remains in force it will maintain in full force and effect Federal registration of said trade names or brands "Rainier" and "Tacoma" and will likewise maintain in full force and effect the present registration of said trade names or brands within the State of Washington and Territory of Alaska. Should Rainier fail to so maintain its rights under said trade names or brands, then and in that event Century shall have the right to pay any and all amounts necessary to so maintain said trade names or brands for and in the name of Rainier, and shall be entitled to deduct any and all amounts so paid from the royalties then due or thereafter becoming due under this agreement.

Tenth: Century agrees that any and all beer, ale, or other alcoholic malt beverages manufactured by it pursuant to this agreement and marketed under said trade names and brands of "Rainier" and "Tacoma" shall at all times be of a quality at least equal to the quality of

> similar products then manufactured and marketed under said trade names and brands by Rainier; and shall be manufactured under the same formulae used in the manufacture of similar products by Rainier, which formulae Rainier shall make available to Century.
>
> * * * * *

The "Licensing Agreement" part of the contract also contained, in paragraph Eleventh, provisions for postponement of the time for payment of the royalty by Century in the event Century was prevented from manufacturing, selling and distributing beer, ale or other alcoholic malt beverages under the trade names for a period of time in excess of three months due to certain named causes; for diminution of the minimum royalty payable in the event local prohibition laws became effective in any portion of the territory covered by the agreement; and an option in Century to terminate the agreement or to submit to arbitration the question of adjusting the minimum royalties payable, in the event Century should be prevented from manufacturing, selling and distributing beer, ale or other alcoholic malt beverages in a quantity less than 52,000 barrels annually, due to governmental action, war regulations, or general prohibitionary laws adopted by the United States or State of Washington (R. 615–617). Paragraph Twelfth provided that the physical properties purchased by Century from Rainier, or the proceeds derived from a sale thereof by Century, were to stand as security of all Century's obligations under the contract and that in the event of default by Century Rainier should also be entitled to recover all royalties due and payable (R. 617–619).

Paragraph Thirteenth, also a part of the "Licensing Agreement," provided (R. 619):

> Thirteenth: It is understood and agreed by and between the parties hereto that at any time after this agreement has been in force for five (5) years, Century shall have the right and option of electing to terminate all royalties thereafter payable hereunder by notifying Rainier of its election so to do, and by executing and delivering to Rainier the promissory notes of Century aggregating in principal amount the sum of one million dollars ($1,000,000.00) dated as of the date of the exercise of such option, bearing interest from date at the rate of five percent (5%) per annum, which said promissory notes shall be divided into five (5) equal maturities and shall be payable respectively on or before one (1), two (2), three (3), four (4), and five (5) years after the dates thereof.

Paragraphs Fourteenth through Twenty-Fifth (R. 619–625) were entitled "Miscellaneous Provisions" (R. 619). Paragraphs Fourteenth, Fifteenth, and Sixteenth provided as follows (R. 619–621):

> Fourteenth: Century agrees that in the operation of its business during the period of time that this agreement remains in force, and from and after August 1st, 1935, it will purchase from Rainier such quantities of malt as shall be required by it in the manufacture of beer, ale, and other alcoholic malt beverages under the trade names and brands of "Rainier" and "Tacoma"; provided, however, that any such malt so purchased from Rainier shall be purchased upon terms and conditions equally as favorable to Century for like quality malt as

terms and conditions offered to it by other concerns selling malt within the territory herein described.

Fifteenth: Century agrees that during the period of time this agreement remains in force, it will use its best efforts to increase the volume of sales of beer, ale, and other alcoholic malt beverages manufactured and sold under the trade names and brands "Rainier" and "Tacoma" so that the same shall equal the volume of the sales of all other such products manufactured and sold by Century under other brands within the territory herein described. Century further agrees that during the first two (2) years that this agreement shall be in force, it shall expend for the purpose of advertising such beverages sold under the trade names and brands of "Rainier" and "Tacoma" an amount equal and equivalent to the sum expended by it during said period in advertising all other beverages manufactured and sold by it under other brands within the territory herein described, and that thereafter and as long as this agreement shall remain in force, it will expend in the advertising of the products manufactured and sold under said trade names and brands "Rainier" and "Tacoma" an amount per barrel equal and equivalent to the amount per barrel expended by it in advertising other beverages manufactured and sold by it under any and all other brands within the territory herein described.

Sixteenth: Century agrees that it will, from time to time and when and as requested by Rainier, sell to Rainier, for distribution by Rainier outside of the territory herein de-

> scribed, products manufactured under said trade names and brands "Rainier" and "Tacoma," which said products shall be sold by Century to Rainier at the cost thereof to Century; and Rainier agrees that it will, from time to time and when and as requested by Century, sell to Century, for distribution by Century within the territory herein described, products manufactured by it in its San Francisco plant under said trade names and brands of "Rainier" and "Tacoma," which said products shall be sold by Rainier to Century at the cost thereof to Rainier. Provided, however, that neither party shall have the right to request delivery of, or purchase, products hereunder in an amount in excess of the surplus products then available for sale by the other party.

Under paragraph Seventeenth Rainier agreed to change the name of its subsidiary, Seattle Brewing and Malting Company, so that Century could use the name or cause a new corporation to be organized with the name. (R. 621–622.) Under paragraph Eighteenth Rainier agreed to transfer to Century two contracts connected with Rainier's Seattle station. (R. 622.) It was also agreed, under paragraph Nineteenth, that Rainier was to transfer to Century all accounts receivable relating to Rainier's business in the territory granted to Century and that Century was to collect the accounts and deposit the collections to Rainier's credit. (R. 622.) The agreement further provided (R. 624–625):

> Twenty-Second: In the event that Century shall fail to fully and promptly carry out the the terms and provisions of this agreement or

to pay, in the manner and at the times herein provided, the payments herein agreed to be paid by it, and such failure continues for a period of thirty (30) days after written notice to it by Rainier, then and in that event, such failure shall be and become an event of default, and Rainier shall cancel this agreement by written notice to Century. Upon Rainier so notifying Century any and all rights of Century hereunder shall immediately terminate and the liquidated damages, herein in paragraph Twelfth provided, shall be immediately transferred and delivered to, and become the property of, Rainier, without, however, in any way restricting the right of Rainier to enforce payment of any and all amounts then due it hereunder.

* * * * *

Twenty-Fourth: This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that no rights of Century hereunder shall be assigned by it without the written consent of Rainier first had and obtained.

Twenty-Fifth: Time is of the essence of this agreement.

The contract was carried into execution. In pursuance of paragraph Seventeenth of the agreement Century changed its name from Century Brewing Association to "Seattle Brewing & Malting Company." Rainier withdrew from the sale and distribution of its alcoholic malt products in Washington. The Seattle plant was deeded by Rainier to Century and Century

conveyed the Seattle plant to a bank as trustee and executed its trust indenture with Rainier as beneficiary, all in accordance with the terms of the agreement (R. 50).

From time to time thereafter various amendments (R. 629–692) were made to the contract of April 23, 1935, none of which substantially affected the provisions respecting the use of the trade names (R. 50). Of the amendments, one, dated November 27, 1935,[4] provided (R. 690):

> Fourth: Notwithstanding the provisions of Paragraph Ninth of said agreement it is understood and agreed by and between the parties hereto that Rainier is hereby given the special right to sell its special brand known to the trade and labelled and designated as "Rainier Special Export" beer to the Alaska Commercial Company f. o. b. San Francisco for delivery in the territory of Alaska at a price not less than that for which Century would sell such brand f. o. b. Seattle, which right shall continue until ten (10) days after receipt by Rainier of written notice from Century requesting that it discontinue such sales.

Another amendment, under the same date, amended paragraph Sixteenth, which related to the sales of beer by each party to the other for distribution in the territory of the other. This amendment provided that sales to the other should be made at a price

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[4] The record in the present case uses March 27, 1935, as the date but is apparently a printing error. (See R. 168; R. 163, No. 11467.)

agreed upon by the parties prior thereto, instead of at cost as the original agreement provided (R. 691).

Thereafter Century, which became the "Seattle Brewing and Malting Company" and will hereafter be called "Seattle," operated under the licensing agreement until July 1, 1940, and royalties paid pursuant thereto were claimed and allowed as deductions for income tax purposes (R. 50–51). During the period from June 30, 1935, to July 1, 1940, Seattle sold alcoholic malt beverages in Washington and the Territory of Alaska under the name of "Rainier" in quantities set out below and paid "royalties" thereon as follows (R. 51):

Year ended June 30—	*Barrels sold*	*Royalties paid*
1936	60, 171. 51	$75, 000. 00
1937	82, 881. 50	75, 000. 00
1938	114, 308. 16	85, 731. 12
1939	112, 538. 17	84, 403. 63
1940	131, 355. 59	98, 834. 47
Total	501, 254. 93	418, 969. 22

On July 1, 1940, Seattle exercised the option granted to it in paragraph Thirteenth of the agreement and executed and delivered to Rainier promissory notes in the aggregate amount of $1,000,000 bearing interest at five percent and payable on five equal maturity dates of one, two, three, four, and five years, respectively, thereafter. These notes were made payable to Rainier. Note No. 1, in the amount of $200,000, was paid on its due date July 1, 1941. Notes Nos. 2 and 3, for $200,000 each, payable on July 1, 1942, and July 1, 1943, respectively, were paid in 1942. In consideration for the advance payment Rainier granted to Seattle, subject to all the terms and conditions of the

contract of April 23, 1935, the "sole and perpetual right and license" to manufacture and market alcoholic malt beverages within the State of Idaho under the trade names and brands "Rainier" and "Tacoma" without any payment therefor other than the payment of the remaining promissory notes given by Seattle in settlement of all royalty payments under the agreement of April 23, 1935 (R. 51–52).

In the fall of 1942 Seattle arranged to pay in advance the notes of July 1, 1944, and July 1, 1945, in the principal amount of $200,000 each, together with interest thereon, less $10,000 of such interest, in consideration of Rainier (1) releasing the properties held by the First National Bank of Seattle, as trusee, from the lien thereon and directing the conveyance of such property to Seattle; (2) releasing the provisions in the contract of April 23, 1935, for the purchase of malt from Rainier; and (3) amending the contract of April 23, 1935, so as to permit the manufacture and sale of beer under the trade names of "Rainier" and "Tacoma" to any plant or plants owned or controlled by Seattle within the States of Idaho and Washington and the Territory of Alaska without the necessity of securing the written consent of Rainier in connection therewith (R. 52).

Aside from the changes indicated above as consideration for advance payment of the notes and accrued interest thereon, no changes were made in the contract of April 23, 1935, after the election by Seattle to exercise the right to "terminate the payment of all royalties" by the payment of $1,000,000 (R. 52).

Upon the exercise of the option and the execution and delivery to Rainier of its promissory notes aggregating $1,000,000, Seattle acquired the perpetual and exclusive right to manufacture and market beer, ale, and other alcoholic malt beverages within the State of Washington and the Territory of Alaska without any further payments and without regard for the amount of alcoholic malt beverages so manufactured and sold (R. 53).

By the exercise of the opinion, as provided in paragraph Thirteenth of the contract, and the payment of the consideration of $1,000,000, Seattle acquired the exclusive and perpetual right to manufacture and sell alcoholic malt beverages in the designated territory under the trade names "Rainier" and "Tacoma" (R. 53).

From the time of its organization in 1893 to 1915 Rainier had brewery and manufacturing facilities located at Seattle in the State of Washington. In the fall elections of November 1914, the State of Washington adopted prohibition, effective January 1, 1916, and in 1915 Rainier moved its manufacturing business from the State of Washington to the State of California, where it built a brewery at San Francisco and removed thereto all of the brewing machinery from its Washington plant, except the cold storage facilities. After 1915 the plant in Seattle was not operated as a brewery, but was used for storage of "Rainier" products which were shipped from San Francisco for sale in the State of Washington. These products during the era of national prohibition con-

sisted of near beer containing one-half of one per cent alcohol (R. 53–54).

Upon the repeal of prohibition in 1933 Rainier began the sale of "Rainier" beer and other alcoholic malt beverages in the State of Washington under the trade name "Rainier," which it continued until 1935, when it entered into the agreement under which Seattle acquired the exclusive and perpetual right to manufacture and sell alcoholic malt beverages under the trade names "Rainier" and "Tacoma" in the State of Washington and the Territory of Alaska and Rainier agreed not to compete with Seattle in the sale of alcoholic malt beverages under these trade names in the limited territory designated in the agreement (R. 54).

From 1908 (and prior thereto) until 1913 Rainier sold alcoholic malt beverages under the trade name "Rainier" in the States of Washington, Montana, Nevada, Arizona, California, and Oregon, and also exported beer to the Orient, Central America, Honolulu, and South America (R. 54).

In determining a deficiency against Rainier, the Commissioner treated the $1,000,000 received by Rainier in 1940 as ordinary income and included the entire amount in its gross income (R. 60–61).

On the basis of the above facts, the Tax Court stated in its findings that "This transaction [respecting the exercise of the option by Seattle] constituted the sale and acquisition of a capital asset" (R. 53). In its opinion in the case the Tax Court relied entirely upon its decision in No. 11467, *Seattle Brewing & Malting Company* v. *Commissioner,* and assumed,

erroneously we believe, that, since it had held that Seattle acquired a capital asset by the payment of the $1,000,000, the $1,000,000 received by Rainier from Seattle necessarily represented the sale price of a capital asset and therefore was not ordinarily income to Rainier (R. 61–62).

Findings with respect to second issue

The Tax Court found as a fact that the fair market value, as of March 1, 1913, of the trade names "Rainier" and "Tacoma" apportionable to the State of Washington and Territory of Alaska was $514,142 (R. 59). If the Tax Court was correct in concluding that a sale resulted in 1940 from Seattle's exercise of its option, a question is presented as to whether, in computing Rainier's capital gain, an adjustment is to be made for obsolescence allowed Rainier in 1918–1920, inclusive.

The facts found by the Tax Court bearing on the obsolescence issue are as follows:

Rainier filed income tax returns for the years 1918, 1919, and 1920, but claimed no deductions therein for obsolescence of good will or trade names. In July 1920, Rainier filed a claim for abatement of taxes for the year 1919, based on a claim for obsolescence of good will. In this claim it computed the value of its good will as of March 1, 1913 (based on the average invested capital for the years 1903 to 1913, inclusive, which was capitalized at 10 percent and an average earning for the same period of $81,336.04 which was capitalized at 15 percent), to be $542,240.27. The Commissioner computed the good will value as of

March 1, 1913, to be $406,680.20, which was arrived at by using the same figures as those used by Rainier, but changing the capitalization rate of good will from 15 percent to 20 percent (R. 60). He then allocated the amount of $406,680.20 to the following years in the following amounts (R. 60):

1918	$345, 061. 95
1919	59, 153. 48
1920	2, 464. 77
Total	406, 680. 20

Rainier derived tax benefits from such allocation as follows (R. 60):

1918	$78,983. 92
1919	59, 153. 48
Total	138, 137. 40

On this issue the Tax Court held that an adjustment for obsolescence was to be made only for the amount of tax benefit received by Ranier, which was $138,137.40 (R. 67–72).

STATEMENT OF POINTS TO BE URGED

The Commissioner's Statement of Points is set out in the record at pp. 596–599. We are not relying upon point 5, R. 598. Point 1, which relates to the amount of the excess profits tax deficiency for 1941, will be answered by this Court's decision as to the amount of Rainier's 1940 income, the reduction in excess profits tax for 1941 having resulted from a carry-over credit from 1940 which would apparently be eliminated under our contentions as to Rainier's 1940 income.

Briefly, we contend as follows:

1. That the Tax Court erred in holding that the $1,000,000 in promissory notes Rainier received in

1940 from Seattle upon the exercise by Seattle of its option was gain from the sale of a capital asset rather than ordinary income.

2. Assuming that there was a sale of a capital asset, that the Tax Court erred in holding that only the amount of obsolescence allowed in 1918–1920, inclusive, which produced a tax benefit, rather than the full amount of obsolescence allowed, is to be taken into account in adjusting Rainier's basis for the determination of gain from the sale.

SUMMARY OF ARGUMENT

I

This Court's power of review on the first issue is not in any way restricted by the doctrine of *Dobson* v. *Commissioner,* 320 U. S. 489. It is undisputed, on the basis of the agreement itself, that Rainier retained the right to use the trade-marks "Rainier" and "Tacoma" on beer, ale, and other alcoholic malt beverages outside of Washington and Alaska and also the right to use the trade names within Washington and Alaska on non-alcoholic beverages, and was to maintain the registrations on the trade-marks in Washington and Alaska, and that Seattle, on the other hand, both before and after its exercise of its option, had only the limited right to use the trade-marks in Washington and Alaska, to use them in those two areas only in connection with the manufacture and sale of beer, ale and other alcoholic malt beverages, and could not assign or license those rights without Rainier's consent. The question whether these undisputed facts established a "sale of capital assets"

within the meaning of Section 117 of the Internal Revenue Code is a clear-cut question of law according to decisions of the Supreme Court, including the decision on rehearing in the *Dobson* case itself, *Dobson* v. *Commissioner,* 321 U. S. 231. While it is not particularly material, the Tax Court's fundamental error was in assuming that since Seattle received a capital asset there was necessarily a "sale" of a capital asset.

As a matter of law, no sale of a capital asset resulted in 1940 when Seattle exercised its option under the April 23, 1935, agreement and the $1,000,000 in promissory notes Rainier received from Seattle was therefore a lump-sum royalty and ordinary income, not gain from the sale of a capital asset. According to the April 23, 1935, agreement, under which the option was exercised, the lump-sum payment was merely a substitute for the annual royalties on a barrelage basis Seattle had previously been paying for its so-called "perpetual" license, and it is settled that a lump-sum payment may constitute a royalty. Assuming that good will may be the subject of a "sale" within the meaning of Section 117 of the Code, a "sale" requires a transfer of "property" and there was no transfer of property in this case. The protection of the good will and trade reputation of a business is the only "property" represented by a trade-mark and a trade-mark is therefore "property" only when transferred with the business itself. Rainier did not transfer its business to Seattle; it merely sold a plant in Seattle which had not been used as a brewery since 1915 and continued in business in San Francisco just as it had previous to the agreement except

that it no longer sold "Rainier" and "Tacoma" beer in Washington and Alaska. Seattle merely received a limited right to use the trade-marks "Rainier" and "Tacoma" in Washington and Alaska for the one purpose—the manufacture and sale of beer, ale and other alcoholic malt beverages—and Rainier's grant of this right only conferred authority on Seattle to infringe upon Rainier's property rights in the trade-marks in Washington and Alaska, rather than being a transfer of the property represented by the trade-marks. Further, there must be a transfer of the absolute and complete property in a thing to constitute a sale and Seattle obviously did not receive the absolute and complete property in anything. Moreover, assuming that, as in patent cases, there may be a sale of trade-marks for a specified area, Rainier did not transfer and Seattle did not receive full and complete ownership of the trade-marks in Washington and Alaska; Seattle had the right to use the trade-marks only in connection with the manufacture and sale of alcoholic malt beverages, whereas Rainier retained the right to use the trade-marks in the same areas on nonalcoholic beverages, and Seattle was given no power to assign or license even its limited rights without Rainier's consent. Nor was there even a complete and absolute transfer of the trade-mark rights for the one purpose of use in connection with the manufacture and sale of alcoholic malt beverages, for Rainier retained such rights of use and complete ownership of the trade-marks for areas other than Washington and Alaska.

II

Assuming that there was a sale, in determining Rainier's gain from the sale the March 1, 1913, value of the trade-marks, which the Tax Court found to be $514,142, must be adjusted by the full amount of obsolescence of Rainier's good will resulting from prohibition and allowed Rainier in 1918 through 1920, and not just, as the Tax Court held, by the amount from which Rainier received a tax benefit. Since Rainier sought a refund of taxes for 1919 based on a claim for a deduction for obsolescence in an amount greater than the amount of $406,680.20 allowed by the Commissioner and allocated by him to the years 1918 through 1920 pursuant to such claim, and since Rainier received tax benefits therefrom for both 1918 and 1919, Rainier must be deemed to have claimed obsolescence in the amount of $406,680.20. That amount was therefore "allowed" as obsolescence within the meaning of Section 113 (b) (1) (B) of the Code despite the fact that Rainier's tax benefit was in a lesser amount. *Virginian Hotel Co.* v. *Helvering,* 319 U. S. 523. Other decisions reflect that the full amount was not any the less "allowed" simply because it later appeared that no obsolescence was "allowable" for obsolescence of good will resulting from prohibition.

ARGUMENT

The first question in this case is whether the $1,000,000 in promissory notes Rainier received from Seattle in 1940 represented a lump sum royalty for a license, in which case the $1,000,000 was ordinary income to Rainier and taxable in full under Section

22 (a) of the Internal Revenue Code (Appendix, *infra*), or the sale price of a capital asset, in which event taxability would be governed by Sections 111–113, inclusive, and Section 117 (Appendix, *infra*). It is our position that, contrary to the Tax Court's conclusion, the $1,000,000 was a lump sum royalty for a license, as Seattle argues in No. 11467, entitled *Seattle Brewing & Malting Co.* v. *Commissioner.* The Tax Court treated the transaction as the sale of a capital asset and therefore was required to answer questions involved in a determination of Rainier's gain from the sale. The second question we have raised on this appeal is as to the correctness of the Tax Court's decision on one of the elements involved in that determination, but that question need not be considered, of course, if the Court agrees with our position that the Tax Court erred in holding that the transaction constituted the sale of a capital asset.

I

The $1,000,000 in promissory notes Rainier received from Seattle constituted an advance lump sum royalty for a license and thus ordinary income to Rainier, not the price received for the sale of a capital asset

A. The $1,000,000 could constitute an advance lump sum royalty, and hence ordinary income to Rainier, even though by its payment Seattle acquired a capital asset

As the Supreme Court stated on rehearing in *Dobson* v. *Commissioner,* 321 U. S. 231, 231–232:

> * * * not every gain growing out of a transaction concerning capital assets is allowed the benefits of the capital gains tax provision. Those are limited by definition to gains from

> "the sale or exchange" of capital assets. Internal Revenue Code § 117 (a), (2), (3), (4), (5).

Even when there is a "sale," the capital gains provisions (see Appendix, *infra*) will not apply unless the sale is of something coming within the definition of a capital asset, which, among other things, excludes depreciable property. It is not settled whether good will, which a trade-mark protects, comes within or without the definition of a capital asset. The Circuit Court of Appeals for the Second Circuit has held that good will is depreciable and therefore not a capital asset, from which it would follow that gain from the sale of good will would be ordinary income and not gain from the sale of a capital asset within the meaning of Section 117 of the Code. See *Williams* v. *McGowan,* 152 F. 2d 570 (C. C. A. 2d). But assuming that good will may be a capital asset within the meaning of Section 117, a transaction involving good will must constitute a "sale or exchange" before the consideration therefor will be deemed capital, rather than ordinary, income. A transaction involving the receipt of good will by one party is not, of course, automatically a "sale." See *Welch* v. *Helvering,* 290 U. S. 111. And, as the Circuit Court of Appeals for the Tenth Circuit stated in *Sunray Oil Co.* v. *Commissioner,* 147 F. 2d 962, 966, certiorari denied, 325 U. S. 861—

> Not infrequently, payments made for an article constitute a capital investment by the payor, but income to the recipient. * * *

For example, a contract under which one company, for a consideration, promises not to compete with a second company in a given area would constitute a capital asset to the second company but would not be the transfer of such "property" as is essential to a "sale."[5]

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[5] The Tax Court recognized this in the present case under its decision on the fourth issue (R. 72–78) when it stated (R. 74):

"Without any question, it is well settled that any amount received for an agreement not to compete would be taxable as ordinary income. *Estate of Mildred K. Hyde*, 42 B. T. A. 738; *John D. Beals*, 31 B. T. A. 966; affd., 82 Fed. (2d) 268; *Christensen Machine Co.*, 18 B. T. A. 256; *Christensen Machine Co.* v. *United States* (Ct. Cls.), 50 Fed. (2d) 282. * * *"

The fourth issue was as to what part, if any, of the $1,000,000 was received by Rainier for its agreement not to compete with Seattle in the manufacture and sale of beer, ale and other alcoholic malt beverages in Washington and Alaska, as set forth in paragraph Ninth of the April 23, 1935, agreement (R. 614). The Tax Court held that no part of the $1,000,000 was paid for the agreement not to compete and the Commissioner has not appealed as to this issue, since it is primarily a factual question.

The Tax Court's holding on the issue may appear incongruous to this Court, as it does to us, and for that reason it might be noted that the decision on the point ignores the realities of the situation. The Tax Court conceded that "It is obvious that in 1935, when the contract between petitioner and Century was entered into, an agreement not to compete had a substantial value" (R. 74) but then stated, on the basis of *Cooper & Co.* v. *Anchor Securities Co.*, 9 Wash. 2d 45, where, unlike the present case, there was a sale of the entire business together with the good will, that it was doubtful that Rainier could have sold the same beer under another name and advertised that fact without being enjoined by Seattle (R. 75). The Tax Court then goes on to conclude that Seattle had so advertised and built up the trade name "Rainier" in Washington and Alaska during the five-year period between the execution of the agreement and Seattle's exercise of the option that any value which the agreement not to compete had in 1935 had been exhausted in 1940, when Seattle exercised its option. Thus, the Tax Court wholly failed to recognize that if Rainier had not agreed

Accordingly, if what Seattle received was a perpetual "license" to use Rainier's trade-marks "Rainier" and "Tacoma," the license was a capital asset to Seattle, as we have shown in our brief in No. 11467, but the consideration Seattle paid for it ($1,000,000 in promissory notes) was a lump sum royalty and thus ordinary income to Rainier, not gain from the sale of a capital asset. The lump sum would be analogous to the cash bonus paid by a lessee as consideration for an oil and gas lease. Such a cash bonus has been held to be an advance royalty and thus ordinary income, not gain from the sale of a capital asset. *Burnet* v. *Harmel,* 287 U. S. 103. On the other hand, the advance royalty, while ordinary income to the lessor, is a capital investment as to the lessee, paid as consideration for the right to exploit the land for oil and gas. *Sunray Oil Co.* v. *Commissioner, supra; Canadian River Gas Co.* v. *Higgins,* 151 F. 2d 954 (C. C. A. 2d); cf. *Quintana Petroleum Co.* v. *Commissioner,* 143 F. 2d 588 (C. C. A. 5th).

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not to compete with Seattle it could have sold "Rainier" beer in Washington and Seattle and any advertising or good will built up by Seattle during the five-year period would apply to "Rainier" beer and not just to Seattle's business. "Rainier" beer would be "Rainier" beer to a beer drinker no matter whose name appeared on the label as the manufacturer, especially since Seattle's "Rainier" beer was required, under the agreement, to be made from malt purchased from Rainier and according to Rainier's formulae. Obviously, therefore, if Rainier had not agreed not to compete with Seattle in Washington and Alaska and had sold "Rainier" beer in Washington and Alaska, Seattle's sales would have been diminished to some extent, depending upon how many distributors purchased from Rainier instead of from Seattle. It follows that Rainier's agreement not to compete must have had some value in 1940.

In *Canadian River Gas Co.* v. *Higgins, supra,* the taxpayer argued that the advance royalties it paid as lessee were deductible on a yearly allocation basis as part of the cost of goods sold, on the theory that, since the advance royalties were taxable as ordinary income to the lessor, they could not constitute the consideration for the transfer to the lessee of any economic interest in the oil or gas in place and, instead, constituted payment in advance for the oil and gas to be extracted. In reply to this argument the Circuit Court of Appeals for the Second Circuit stated (151 F. 2d at 956):

> The fallacy of that argument lies in the assumption that since the advance royalties are taxed to the lessor or ordinary income because they are part of the consideration passing to the lessor for granting to the lessee the right to obtain a series of transfers of the oil as produced, *Burnet* v. *Harmel, supra,* the grant in the hands of the lessee is not to be treated as a capital asset nor the advance royalties paid for it as a capital investment. * * *
> What the lessor gets *for* the lease and how that should be taxed does not control decision as to the character of what the lessee gets *under* the lease. Just as advance royalties may be consideration for a lease and also ordinary income to the lessor, *Burnet* v. *Harmel, supra,* they may be capital investments by a lessee when paid for capital assets. They are analogous to rentals that are taxable as income to a landlord though they may be bonuses or advances which the lessee must capitalize. *Baton Coal Co.* v. *Commissioner,* 3 Cir. 51 F. 2d 469.

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> So it does not follow, as the plaintiff argues, that because the advance royalties are taxable as ordinary income to the lessors the lessee did not make a capital investment when it paid them in consideration of the leases. * * *

Similarly, in *Sunray Oil Co.* v. *Commissioner, supra,* where the taxpayer also contended that it was entitled to exclude from its gross income an aliquot part of the advance royalties paid by it to the lessors, the Circuit Court of Appeals, for the Tenth Circuit stated (147 F. 2d at 966):

> While advance royalties are regarded as income to the lessor, with respect to the lessee, they represent cost and are a capital expenditure. There is no incongruity in the view that a bonus and royalty are "consideration for the lease, and are income of the lessor." *Burnet* v. *Harmel, supra,* 287 U. S. 103 at page 112, * * '.

The lessee of an oil and gas lease receives a percentage depletion deduction on its gross income other than the advance and annual royalties it pays to the lessor, but that fact is immaterial so far as the present case is concerned. Oil and gas leases are exhaustible assets, whereas taxpayers license was not.

B. The Dobson doctrine does not preclude this Court from determining that the $1,000,000 in notes did not represent the sale price of a capital asset

The Tax Court included in its findings of fact a finding that "This transaction [the exercise by Seattle of its option] constituted the sale and acquisition of a capital asset" (R. 53) but, as we will show, this finding resulted from the view, already shown to

be erroneous, that Rainier necessarily made a "sale" merely because Seattle acquired a capital asset in the transaction. The Tax Court's finding that there was a "sale" does not in any event preclude review by this Court, as will be seen.

As we showed in our brief in the Seattle case, No. 11467, Seattle did in fact make a capital investment and acquire a capital asset or something in the nature of a capital asset for which it paid $1,000,000 when on July 1, 1940, it exercised its option under the the April 23, 1935, agreement and delivered to Rainier the five promissory notes totalling $1,000,000. Seattle's acquisition of the capital asset, which consisted of a limited right to use the trade name "Rainier", etc., did not depend upon whether a "sale" resulted from Seattle's exercise of its option. The question in the *Seattle* case was simply whether Seattle was entitled to a business expense deduction for the $300,000 which accrued on the notes in 1940 and 1941; and, since the $300,000 was part of the total $1,000,000 capital investment and was paid for something of a permanent nature whose value remained constant and whose cost therefore could not be allocated over any given number of years, the $300,000 was not deductible as a business expense even though it constituted an advance lump sum royalty for a license. An argument to that effect was made in the Tax Court by the Commissioner, was adopted by the Tax Court in its opinion in the *Seattle* case (see R. 58–59, 60, 71, No. 11467), but apparently without a clear understanding of its effect, and fully sustained the Tax Court's ultimate conclusion in the *Seattle* case

that "upon the exercise of the option petitioner [Seattle] acquired a capital asset for which it paid $1,000,000" (R. 72, No. 11467).

Nevertheless, the Tax Court's decision in the present case is based upon its decision in the *Seattle* case and in both cases the Tax Court assumed that, because Seattle made a capital investment and acquired a capital asset, a sale necessarily resulted from Seattle's exercise of the option. In the *Seattle* case the Tax Court stated that (R 54, No. 11467)—

> The question, therefore, turns on whether the sum of $1,000,000 is to be regarded as an expense in the nature of prepaid royalties or whether it is to be regarded as a capital expenditure. * * *

and in the remainder of the opinion went on to discuss the provisions of the April 23, 1935, agreement and the pertinent decisions in the light of the question whether Seattle acquired a license or there was a sale (R. 54–72, No. 11467), the Tax Court's theory apparently being that Seattle made a capital expenditure only if the exercise of its option in 1940 resulted in a sale. The Tax Court was not required to and did not specifically hold that there was a sale, but it did state ultimately that "This was a capital transaction" (R. 72, No. 11467), which of course it was as to Seattle but not necessarily as to Rainier.

In its decision in the present case the Tax Court stated that the first issue is whether the $1,000,000 in notes received by Rainier from Seattle was ordinary income and then, as in its decision in the *Seattle* case, states (R. 61):

> The question turns on whether the sum of $1,000,000 is to be regarded as prepaid royalties, or whether it is to be regarded as an expenditure in the acquisition of a capital asset.

Thus again the Tax Court failed to recognize that the $1,000,000 could constitute prepaid royalties and still be an expenditure in the acquisition of a capital asset. This error is further, and fatally, perpetuated in the opinion in the present case, which, on the first issue, consists only of a statement that the issue "is governed" by the decision in the *Seattle* case (R. 61); a quotation from the decision in the *Seattle* case which concludes with the statement that "upon the exercise of the option petitioner [Seattle] acquired a capital asset for which it paid $1,000,000" (R. 62); and another statement that "Upon the authority of" the *Seattle* decision the $1,000,000 was not ordinary income to Rainier (R. 62).

Thus, the Tax Court's failure to recognize that Seattle's acquisition of a capital asset was not conclusive of the nature of the $1,000,000 in the hands of Rainier obviously colored the Tax Court's factual conclusion that there was a "sale." Only ostensibly, and not even specifically, did the Tax Court determine that the $1,000,000 constituted the sale price of a capital asset rather than an advance lump-sum royalty, for a "sale" to the Tax Court meant the acquisition of a capital asset by Seattle and Seattle obviously did acquire a capital asset.

However, this Court's power to review the issue and reverse the Tax Court's decision is not limited in any way even if full effect is given to the Tax

Court's finding that there was a sale. There is no factual question here as to the intent of the parties (as in *Choate* v. *Commissioner,* 324 U. S. 1) or as to whether title passed in the transaction. The intent of the parties is uncontrovertibly evident from the written agreement itself and the Tax Court in no way intimated that the parties' intent might have been different from the intent expressed in the agreement. As will be seen, it is plain from the agreement, and therefore undisputed, that Rainier retained the right to use the trade-marks "Rainier" and "Tacoma" on beer, ale, and other alcoholic malt beverages outside of Washington and Alaska and to use the trade-marks on nonalcoholic beverages within Washington and Alaska, and was to maintain the registration of the trade-marks in Washington and Alaska, and that Seattle, after as well as before the exercise of its option in 1940, had only the limited right to use the trade-marks in Washington and Alaska, to use them in those areas only in connection with the manufacture and sale of beer, ale and other alcoholic malt beverages, and could not assign or license even those limited rights without Rainier's consent. The question in the case is whether these undisputed facts establish a "sale of capital assets" within the meaning of Section 117 of the Internal Revenue Code. Since its decision in *Dobson* v. *Commissioner,* 320 U. S. 489, the Supreme Court has frequently determined whether the facts found by the Tax Court come within the meaning of statutory language, as the Supreme Court itself recognized in *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, where it stated (p. 371):

> Since our decision in the *Dobson* case we have frequently reexamined, as matters of law, determinations by the Tax Court of the meaning of the words of a statute as applied to facts found by that court. * * *

For this statement the Court cited sixteen of its decisions. To these may be added *Trust of Bingham* v. *Commissioner, supra; Crane* v. *Commissioner,* decided April 14, 1947 (1947 P-H, par. 72,004); *McWilliams* v. *Commissioner,* decided June 16, 1947 (1947 P-H, par. 72,007). As the Supreme Court stated in the *Trust of Bingham* v. *Commissioner, supra,* pp. 371-372, questions whether the facts found come within the meaning of the statutory language—

> are therefore questions of law, decision of which is unembarrassed by any disputed question of fact or any necessity to draw an inference of fact from the basic findings. See *Commissioner* v. *Scottish American Investment Co., supra.* They are "clear cut" questions of law, decision of which by the Tax Court does not foreclose their decision by appellate courts, as in other cases. * * *
>
> * * * * *
>
> * * * the statute [authorizing determination of whether decisions of the Tax Court are "in accordance with law"] does not leave the Tax Court as the final arbiter of the issue whether its own decisions of questions of law are right or wrong. * * *

The *Dobson* case itself is authority for the proposition that only a question of law is presented when the question is whether the undisputed facts establish

a "sale of a capital asset" within the meaning of Section 117. In two of the four cases covered by the first *Dobson* decision there was a petition for rehearing on which the Supreme Court filed an opinion. *Dobson* v. *Commissioner,* 321 U. S. 231. This decision is best stated in the language of the Supreme Court, which was as follows (pp. 231–232):

> In these two cases the Tax Court held that recoveries by these taxpayers in 1939 did constitute taxable income. It held, also, that the recovery was taxable as ordinary income, despite taxpayer's contention that it should be taxed as capital gain under § 117 of the Internal Revenue Code. This contention, the petition says, presents questions of law to be determined by this Court, rather than of fact finally to be determined by the Tax Court.
>
> The weakness of taxpayers' position lies in the fact that not every gain growing out of a transaction concerning capital assets is allowed the benefits of the capital gains tax provision. Those are limited by definition to gains from "the sale or exchange" of capital assets. Internal Revenue Code § 117 (2), (3), (4), (5).
>
> *We certainly cannot say that the items in question were as matter of law proceeds of the "sale or exchange" of a capital asset.* Harwick asserted a claim, and the three other taxpayers involved in these cases filed suit, against the National City Company, demanding rescission of their purchases of stock. Their claims were compromised or admitted; the taxpayers seek to link the recoveries resulting therefrom with their prior sales of the stock, which resulted

> in losses. The Tax Court did not find as matter of fact, and *we decline to say as matter of law, that such a transaction is a "sale or exchange" of a capital asset in the accepted meaning of those terms.* Cf. *Helvering* v. *Flaccus Leather Co.,* 313 U. S. 247; *Fairbanks* v. *United States,* 306 U. S. 436. * * * [Italics supplied.]

Thus, the Supreme Court did not deem itself bound by the Tax Court's decision as to whether on the facts there was a sale of capital assets; the facts were simply insufficient to establish a sale. In the present case the facts do furnish a basis for holding that, contrary to the Tax Court's conclusion, there was *not* a sale.

Moreover, regardless of what interpretation is placed upon the *Dobson* doctrine as enunciated in the first *Dobson* decision, 320 U. S. 489, the doctrine has never been construed as precluding review where there is no factual basis for the Tax Court's decision. This alone is sufficient basis for the reversal of the Tax Court's decision in the present case on the first issue.

C. Under the terms of the April 23, 1935, agreement Seattle acquired only a limited right to use Rainier's trade names "Rainier" and "Tacoma," etc.

The April 23, 1935, agreement between Seattle and Rainier makes it clear, and neither Rainier nor Seattle disputes the fact, that both before and after July 1, 1940, when Seattle exercised the option given it under paragraph Thirteenth of the agreement, Seattle had only a *limited* right to use the trade names "Rainier" and "Tacoma," etc., held by Rainier.

The "Purchase Agreement" part of the April 23, 1935, agreement related to the purchase by Seattle and the sale by Rainier of a plant in Seattle, Washington, which had not been used by Rainier as a brewery since 1915 but which after the repeal of prohibition in 1933 was used by Rainier as a warehouse and sales office for the distribution in the State of Washington of the products it manufactured at San Francisco, California (R. 39–41). Since Seattle was a "competing company" in the State of Washington, as the Tax Court found (R. 41), and consequently had a brewery of its own in that State, and since there is nothing in the record to indicate that Seattle needed additional facilities, the "Purchase Agreement" part of the agreement is of no significance for present purposes except for the fact that Rainier's Seattle plant, after its purchase by Seattle, was to stand as security for the performance by Seattle of its obligations under the contract.

The first paragraph of the "Licensing Agreement" provided as follows (R. 611–612):

LICENSING AGREEMENT

> Seventh: Rainier hereby grants to Century the sole and exclusive perpetual right and license to manufacture and market beer, ale, and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade names and brands of "Rainier" and "Tacoma," together with the right to use within said State and Territory any and all copyrights, trade-marks, labels, or other advertising media adopted or used by Rainier in con-

> nection with its beer, ale, or other alcoholic malt beverages.

Thus, Seattle's license included not only the use of the trade names "Rainier" and "Tacoma" but the right to use any and all copyrights, trade-marks, labels, or other advertising media adopted or used by Rainier in connection with its beer, ale, or other alcoholic malt beverages. For convenience, the license will be referred to simply as a right or license to use the trade names "Rainier" and 'Tacoma." The license was limited geographically to the State of Washington and Territory of Alaska and even in that State and territory applied only in connection with the manufacture and sale of beer, ale, and other alcoholic malt beverages. Paragraph Ninth expressly provided (R. 614):

> It is understood and agreed, however that Rainier shall have the sole and exclusive right to manufacture, sell, and distribute *non-alcoholic* beverages within said territory under said trade names or brands of "Rainier" and "Tacoma" and any and all other trade names or brands that it owns and desires to use. [Italics supplied.]

Therefore, although Seattle's license was, as the parties stated, a "sole and exclusive * * * right and license" to manufacture and sell beer, ale, and other alcoholic beverages under the trade names "Rainier" and "Tacoma" in Washington and Alaska, the license was not sole and exclusive as to either that territory or as to its use in connection with beer, ale, and other alcoholic beverages. Rainier retained both

the right to use the trade names in Washington and Alaska on nonalcoholic beverages and the right to use the trade names in states and territories other than Washington and Alaska on beer, ale, and other alcoholic malt beverages—the products on which it licensed Rainier to use the trade names in Washington and Alaska. The contract was even amended to permit Rainier to distribute its "Rainier Special Export" beer in Alaska so long as Seattle did not request that it discontinue such sales (R. 690). Seattle's license was further limited by the fact that the agreement specifically provided that Seattle could not assign any of its rights under the agreement without Rainier's consent (R. 625). Rainier, not Seattle, was to maintain registrations on the trade names both in Washington and Alaska (R. 614–615).

The agreement did not provide for any change in the scope of Seattle's license if it exercised its option and when it did exercise the option on July 1, 1940, all that occurred was that the lump-sum payments were substituted for the annual royalties which Seattle had been paying. Neither Rainier nor Seattle contends that Seattle's license was enlarged in scope by the exercise of the option. The option was simply a right after five years "of electing to terminate all royalties *thereafter* payable hereunder" [Italics supplied] (R. 619).

The only point on which Rainier and Seattle disagree in respect of the interpretation of the agreement is as to whether, after the exercise of its option, Seattle was bound by other provisions of the agreement which, if not fulfilled, might have resulted in a

default and consequent forfeiture of the license. Rainier contended in the Tax Court that the agreement did not continue in effect after the exercise of the option, because the Seattle plant was to be security for the performance of Seattle's obligations under the agreement and paragraph Fifth provided for release of that security upon exercise of the option, and that, therefore, after the exercise of the option Rainier no longer had the right to terminate the agreement on default of its provisions by Seattle. (See, e. g., R. 135). Seattle, on the other hand, contended in the Tax Court and contends here that the contract did remain in effect and that its license was good for only such time as it continued to comply with the provisions of the agreement. The Tax Court in its opinion in the *Seattle* case, on which its decision in the present case was based, stated that it was doubtful whether the conditions of the agreement survived the exercise of the option but assumed that the conditions did survive the agreement and minimized their effect, stating that they were for the mutual benefit of both parties and that the forfeiture clause of the agreement was no longer operative *in a real sense* (R. 61–62, 66, No. 11467).

While we do not think that the resolution of this point is essential to a reversal of the Tax Court's decision, it should be noted that Rainier's position finds little, if any, support in the record. Certainly, there is no basis for Rainier's contention that the agreement did not remain in effect after the exercise of the option by Seattle, for the agreement not only contains no provision for its termination upon exercise of the option

but Rainier itself treated the agreement as still effective. After the exercise of the option, Rainier, in consideration of the advance payment of two of the promissory notes given by Seattle, agreed that the territory described in the April 23, 1935, agreement "shall be enlarged so as to include the State of Idaho" (R. 705). Under the agreement Seattle was required, among other things, to purchase malt from Rainier and could not assign its rights under the agreement without Rainier's consent (R. 619–620, 625). Rainier treated these provisions as still effective after the exercise of the option by Seattle, for on November 25, 1942, Rainier wrote to Seattle stating (R. 709–710):

> Second. We have further, in consideration of your obtaining the advance payment of the two promissory notes hereinbefore referred to [the last two, Nos. 4 and 5], released and do hereby release Seattle Brewing & Malting Company and its successors in interest, of and from all past, present or future claims or obligations existing or arising out of the provisions of Paragraph XIV of the Miscellaneous provisions of said agreement of April 23, 1935, with reference to the purchase of malt.
>
> Third. We do further, in consideration of your obtaining the advance payment of the notes hereinbefore referred to, agree that the license granted by the terms of said agreement of April 23, 1935, and the amendment thereof dated April 13, 1942, extending the territory covered thereby to include the state of Idaho, shall be considered amended as to Paragraph XXIV of said agreement of April 23, 1935, so that the right to manufacture and sell beer under the

> trade names "Rainier" and "Tacoma" within the territories covered by said agreement may by the Seattle Brewing & Malting Company be extended to any plant or plants of any brewing company located within the states of Washington, Idaho or the Territory of Alaska of which the Seattle Brewing & Malting Company may be the owner or in control, this without the necessity of securing the written consent of the undersigned in connection therewith.

Rainier did not release Seattle from its other obligations under the agreement and, since Rainier regarded matters in the agreement as the proper subjects of release for a consideration, Rainier must necessarily also have considered Seattle's other obligations as remaining in effect after the exercise of the option. These included Seattle's obligations to maintain at all times the quality of its "Rainier" and "Tacoma" beer, ale and other alcoholic malt beverages at least equal to the quality of similar products manufactured and marketed under the trade-names by Rainier (R. 615); to increase the volume of "Rainier" and "Tacoma" beer sold in its territory so that it should be equal to the volume of sales of all other such products manufactured and sold by Seattle (R. 620); "as long as this agreement shall remain in force," to expend in advertising its "Rainier" and "Tacoma" products an amount per barrel equal and equivalent to the amount per barrel expended by it in advertising other beverages manufactured and sold by it under any and all other brands within the territory described in the agreement (R. 620); and to sell its surplus "Rainier"

and "Tacoma" products to Rainier for sale outside Seattle's territory (R. 621). Obviously, these provisions were important to Rainier, which was selling "Rainier" and "Tacoma" beer in neighboring states and had the right to, and probably was, selling non-alcoholic beverages in Washington and Alaska under the trade names "Rainier" and "Tacoma." The maintenance of volume production, quality, and advertising by Seattle certainly was beneficial to Rainier and, conversely, the failure by Seattle to maintain volume production, quality, and advertising would have adversely affected Rainier's sales of products under the trade names. That no doubt was the reason for the inclusion of the provisions in the first place. Since they were part of the agreement and Rainier, as already shown, considered the agreement as remaining in effect after Seattle's exercise of its option, paragraph Twenty-Second of the agreement also remained in effect. That paragraph provided in part as follows (R. 624):

> Twenty-second: In the event that Century shall fail to fully and promptly carry out the terms and provisions of this agreement or to pay, in the manner and at the times herein provided, the payments herein agreed to be paid by it, and such failure continues for a period of thirty (30) days after written notice to it by Rainier, then and in that event, such failure shall be and become an event of default, and Rainier shall cancel this agreement by written notice to Century [Seattle]. Upon Rainier so notifying Century [Seattle] any and all rights

> of Century hereunder [Seattle] shall immediately terminate. * * *

After Seattle had paid off the $1,000,000 in promissory notes, a default could not occur by reason of Seattle's failure to pay, but paragraph Twenty-second, just quoted, also contemplated a default for failure "to fully * * * carry out the terms and provisions of this agreement" and such a default could obviously occur just as well after the execution of the option as before. The agreement does not state that either it or the default provision was to become ineffective upon exercise of the option. If the parties had intended that either should become ineffective, they could very easily have so stated in the agreement. Instead, the agreement makes no provision for a difference in Seattle's status after the exercise of the option except as to the amount of and time for the payments Seattle was to make for the license. In Washington particularly, Rainier of course still had a vital interest in the maintenance of the quality of "Rainier" and "Tacoma" beer by Seattle and in the advertising and maintenance of the volume of production, for Rainier sold "Rainier" beer in the neighboring State of Oregon and was entitled to, and may have, sold nonalcoholic beverages in Washington under the trade name "Rainier." Moreover, the very fact that Rainier had not given Seattle the right to assign its rights under the April 23, 1935, agreement shows that Rainier necessarily retained the reversion in Seattle's license and, of course, a reversion could occur only by reason of some failure on the part of Seattle.

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D. Seattle's acquisition of the limited right to use Rainier's trade names "Rainier" and "Tacoma," etc., did not constitute a transfer of "property" essential to a "sale"

It is axiomatic that a transfer of "property" is essential to a "sale" (*Ratigan* v. *United States,* 88 F. 2d 919, 921 (C. C. A. 9th), certiorari denied, 301 U. S. 705, rehearing denied, 302 U. S. 774) and the property right in a trade-mark has been well defined. As the Supreme Court recently stated in *Champion Spark Plug Co.* v. *Sanders,* decided by the Supreme Court April 28, 1947, referring to its opinion in *Prestonettes, Inc.* v. *Coty,* 264 U. S. 359—

> Mr. Justice Holmes stated, "A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. * * *"

Similarly, in *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403, 413, 414, it was stated that a trade-mark—

> is a property right but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trade-mark is an instrumentality.
>
> * * * * *
>
> In short, the trade-mark is treated as merely a protection for the good will, and not the subject of property except in connection with an existing business. * * *

Again in *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90, 97, it was stated that—

> There is no such thing as property in a trade-mark except as a right appurtenant to an estab-

> lished business or trade in connection with which the mark is employed. * * * the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. * * *

These decisions sufficiently establish that the only "property" in a trade-mark is the continued enjoyment and protection of the owner's trade reputation and good will—a type of "property" which necessarily follows the business itself.[6] As this Court stated in *California Packing Corp.* v. *Sun-Maid R. Growers,* 81 F. 2d 674, 678—

> A manufacturer cannot make a valid assignment of a trade-mark and continue the manufacture or sale of the same products in connection with which the trade-mark was used. *Eiseman* v. *Schiffer* (C. C.) 157 F. 473; *Independent Baking Powder Co.* v. *Boorman* (C. C.) 175 F. 448.

Assuming that good will is a capital asset within the meaning of the capital gains provisions, it nevertheless appears that in exercising its option Seattle did not acquire the "property" in or represented by the trade-marks "Rainier" and "Tacoma" and, accordingly, that the exercise of the option could not have resulted in a sale. Rainier remained in the

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[6] A trade-mark may be *licensed* when it remains associated with the same product. See *E. F. Prichard Co.* v. *Consumers Brewing Co.,* 136 F. 2d 512 (C. C. A. 6th), certiorari denied, 321 U. S. 763.

same business, continued to manufacture and sell "Rainier" beer, and had the right to use the trade-marks on non-alcoholic beverages in Washington and Alaska. The trade-marks and the protection of good-will and trade reputation which they represented remained attached to Rainier's business *after* the exercise by Seattle of its option, since Rainier did not sell its business to Seattle.[7] Thus, by the April 23, 1935, agreement, both before and after the exercise of the option, Rainier simply relinquished a part of the protection represented by the trade names; in other words, Rainier sanctioned a limited infringement by Seattle on Rainier's trade-mark rights. In a broad sense this might be regarded as a transfer of part of Rainier's good will, but Rainier's good will was not "property" unless it was transferred along with Rainier's business, which it was not. Thus, there was no actual transfer of the "property" represented by the trade-marks. Cf. *United States* v. *Fairbanks,* 95 F. 2d 794 (C. C. A. 9th), affirmed, 306 U. S. 436.

The transaction was similar to other transactions which have held to result in ordinary, rather than capital, income. In *Yost* v. *Commissioner,* 155 F. 2d 121 (C. C. A. 9th), the taxpayer, who was the majority stockholder in Tricoach, received lump sum payments as consideration for his consent to a discontinuance of Tricoach's business and a sale of its facilities to the Newells, the other two stockholders, who had an op-

[7] Rainier's business had been carried on from San Francisco for years. The Seattle, Washington, plant it sold to Seattle was used merely for storage and as a distribution center.

portunity for employment with the American Car and Foundry if they could obtain the facilities of Tricoach. The purchase price of the facilities was paid by the Newells to Tricoach and Tricoach then distributed the proceeds to the stockholders, according to their respective interests, under an agreement that the distributions would be returned if Tricoach resumed business. The taxpayer, who had received the lump-sum payments for his consent to the discontinuance of business and the sale to the Newells, still retained his stock, which gave him power to demand the return of the distributed funds if Tricoach resumed business. He contended that the transaction of the sale of the plant facilities was a liquidation of the corporate assets by which the stock he owned had been merged into the promises of the Newells to pay the consideration for his consent and vote for the sale. This Court held that the stock was still owned by the taxpayer and had not been sold or exchanged within the meaning of Section 117 of the Internal Revenue Code and that the money the taxpayer received from the Newells for his agreement to consent and vote for the sale of the facilities of Tricoach and not to continue in business was ordinary, not capital, income. In the instant case Rainier too had merely consented to something for a consideration but retained the ownership of that which could have been the subject of sale. In *Hale* v. *Helvering,* 85 F. 2d 819 (App. D. C.), it was held that the compromise of notes which the maker was able to pay was not the sale of a capital asset. The Court there stated (p. 821):

> Neither business men nor lawyers call the compromise of a note a sale to the maker. *In point of law and in legal parlance property in the notes as capital assets was extinguished, not sold.* * * * [Italics supplied.]

Similarly, in the instant case Rainier's property as represented by the trade-marks "Rainier" and "Tacoma" was partially extinguished, not sold, under the April 23, 1935, agreement and Seattle's exercise of its option. Cf. *Helvering* v. *Flaccus Leather Co.,* 313 U. S. 247.

United States v. *Adamson,* decided by this Court on May 16, 1947 (1947 P–H, par. 72,474), is not in conflict with our position here. In that case it was held that the taxpayer had made a sale of capital assets in transferring his undivided one-half interest in partnership assets which included two contracts of sale involving patent and trade-mark rights. The taxpayer had been a partner with his brother and the two contracts of sale had originally been executed by the partnership and the partnership later repudiated by the other brother. The taxpayer, after obtaining a judgment that he had a one-half undivided interest in all of the assets of the partnership, entered into a four-party contract whereby, for a consideration payable in installments, he transferred his entire interest in the partnership assets, which included his interest in the two contracts of sale and any interest he may have had in the patent and trade-mark. The holding that the taxpayer had made a sale of capital assets was based primarily on the fact that he had made a transfer of all of his interest in the remaining assets

of the partnership. The Court was not required to determine whether the two contracts of sale were sales rather than licenses.

E. Even assuming that the transaction between Rainier and Seattle was a transfer of "property," the result was nevertheless a license and not a sale

As the Tax Court recognized (R. 60, No. 11467), a lump sum payment does not necessarily imply a sale as distinguished from a license. While a royalty is usually paid at a specified rate and periodically, a lump sum payment may also be a royalty if it is paid by a licensee to a licensor for the use of something. *Rohmer v. Commissioner,* 153 F. 2d 61 (C. A. A. 2d), certiorari denied, 328 U. S. 862; *Sabatini* v. *Commissioner,* 98 F. 2d 753 (C. A. A. 2d); *Hazeltine Corp.* v. *Zenith Radio Corp.,* 100 F. 2d 10, 16–17 (C. A. A. 7th). As the Circuit Court of Appeals for the Tenth Circuit stated in *Commissioner* v. *Affiliated Enterprises,* 123 F. 2d 665, 668—

> While payment ordinarily is at a certain rate for each article or certain percent of the gross sale, that in itself is not determinative. *The purpose for which the payment is made and not the manner thereof is the determining factor.* [Italics supplied.]

To the same effect, see *Rohmer* v. *Commissioner, supra.*

Seattle's right to the use of the trade-marks "Rainier" and "Tacoma" was not enlarged by the exercise of its option and execution of the five promissory notes aggregating $1,000,000. The promissory notes, or lump sum payments, were merely a substi-

tute for the annual payments on a barrelage basis previously paid by Seattle and, since those annual payments were considered to be and were in fact royalties for a license, the lump sum obligations also represented royalties. In *Hort* v. *Commissioner,* 313 U. S. 28, Hort, who had received $140,000 in consideration for the cancellation of a lease of premises, contended that the $140,000 was capital rather than ordinary income. The Supreme Court, after stating that Section 22 (a) defines gross income as including rent, continued as follows (pp. 30–32):

> Plainly this definition reached the rent paid prior to cancellation just as it would have embraced subsequent payments if the lease had never been canceled. It would have included a prepayment of the discounted value of unmatured rental payments whether received at the inception of the lease or at any time thereafter. Similarly, it would have extended to the proceeds of a suit to recover damages had the Irving Trust Co. breached that lease instead of concluding a settlement. * * * That the amount petitioner received resulted from negotiations ending in cancellation of the lease rather than from a suit to enforce it cannot alter the fact that *basically the payment was merely a substitute for the rent reserved in the lease.* * * *
>
> The consideration received for cancellation of the lease was not a return of capital. We assume that the lease was "property," whatever that signifies abstractly. * * * *Where, as in this case, the disputed amount was essentially a substitute for rental payments which § 22*

> (*a*) *expressly characterizes as gross income, it must be regarded as ordinary income,* and it is immaterial that for some purposes the contract creating the right to such payments may be treated as "property" or "capital."
>
> * * * * *
>
> The cancellation of the lease involved nothing more than relinquishment of the right to future rental payments in return for a present substitute payment and possession of the leased premises. * * * [Italics supplied.]

While the parties' conception of the legal effect of a transaction is not controlling, it is at least significant that Rainier itself apparently assumed that Seattle had nothing more than a license after the exercise of the option by Seattle and that the promissory notes aggregating $1,000,000 constituted a lump-sum royalty. Under date of July 1, 1940, the president of Rainier called a special meeting (1) to consider a recent proposal submitted by Seattle and approving the action of the officers of Rainier in relation thereto (R. 741) and (2) to consider and, if advisable, take action upon any and all matters relating to the tender by Seattle of its promissory notes aggregating $1,000,000 "for a perpetual license" to use the trade names "Rainier" and "Tacoma" in the State of Washington and Territory of Alaska and to accept those notes as consideration therefor (R. 742). On the following day, at the special meeting so called, the board of directors of Ranier adopted a resolution authorizing its officers to accept the five promissory notes aggregating $1,000,000 pursuant to the provisions of

paragraph Thirteenth of the agreement (R. 743–744) and, with respect to the proposal submitted by Seattle and referred to in the notice of the meeting, adopted a resolution approving the action of its officers and executive committee in refusing to accept the proposal of Seattle, which was to amend the April 23, 1935, agreement so as to provide for the payment of Seattle of $400,000 in cash before January 2, 1941, and the execution of promissory notes aggregating $600,000 payable over a period of five years in consideration of Rainier's granting Seattle "a perpetual license" to manufacture and sell its products under the trade names "Rainier" and "Tacoma" *in Oregon and Idaho* "without further consideration or payment of royalties" (R. 742–743). Later, on April 11, 1942, Seattle offered to pay in April 1942, the two notes due July 1, 1942, and July 1, 1943, if Rainier would give Seattle a letter adding the State of *Idaho* to the agreement of April 23, 1935 (R. 703–704). In answer Rainier wrote referring to the April 23, 1935, agreement and stating as follows (R. 705–706):

> In consideration of your paying the principal and interest to date of payment of your two promissory notes, each in the principal sum of $200,000, and payable to the undersigned on July 1, 1942, and July 1, 1943, respectively, it is agreed that the territory described in the agreement shall be enlarged so as to include the State of Idaho, and you are hereby granted, subject to all the terms and provisions of the agreement, the sole and perpetual *right and license*

> to manufacture and market beer, ale, and other alcoholic malt beverages within the State of Idaho under the trade names and brands of "Rainier" and "Tacoma," *without the payment of any royalty therefor other than the payment of the remaining promissory notes heretofore given by the Seattle Brewing & Malting Company in settlement of all royalty payments under said agreement of April 23, 1935.* The undersigned hereby expressly reserves the right to manufacture and/or market beer, ale, and other alcoholic malt beverages within the State of Idaho under trade names and brands other than "Rainier" and "Tacoma." [Italics supplied.]

William F. Humphrey, who was formerly the general counsel of Rainier (R. 418–419), participated in the negotiations leading up to the execution of the April 23, 1935, agreement (R. 419) and appeared before the Tax Court on Rainier's behalf, testified that when they discussed the question of royalties during the negotiations (R. 425)—

> it was suggested that then they [Seattle] would want to, after five years have the right or some period of time, *the right to acquire perpetual royalties.* [Italics supplied.]

There was some evidence that Seattle's option was regarded as a right to purchase but this evidence was inconsequential. It consisted of a reference by Dun & Bradstreet to the exercise of the option as a purchase (R. 818); a newspaper account, supposedly attributable to the president of Seattle, that Seattle was privileged to make an outright purchase for $1,000,000

(R. 483); and a statement in Rainier's annual statement for 1940 that the $1,000,000 "was received in consideration of the sale of certain intangible assets" (R. 810).

In any event, assuming that "property" was involved in the transaction between Rainier and Seattle, no sale resulted from the exercise of the option by Seattle. To constitute a sale, there must be a transfer of the *absolute and general property* in a thing (*Butler* v. *Thomson,* 92 U. S. 412, 415; *In re Grand Union Co.,* 219 Fed. 353, 356 (C. C. A. 2d), certiorari denied *sub nom. Hamilton Inv. Co.* v. *Ernst,* 238 U. S. 626, and appeal dismissed, 238 U. S. 647) or, as sometimes stated, a transfer of title (*Hale* v. *Helvering,* 85 F. 2d 819, 821 (App. D. C.); *Sabatini* v. *Commissioner,* 98 F. 2d 753 (C. C. A. 2d); *MacDonald* v. *Commissioner,* 76 F. 2d 513, 514 (C. C. A. 2d); *Palmer* v. *Jordan Mach. Co.,* 186 Fed. 496, 512 (N. D. N. Y.), modified, 192 Fed. 42 (C. C. A. 2d); *De Bary* v. *Dunne,* 172 Fed. 940, 942 (D. Ore.)). The rights Seattle received were exceedingly limited, as we have already shown, and Seattle obviously did not receive the absolute and general property in anything as a result of the exercise of its option. Rainier retained the use of the trade names "Rainier" and "Tacoma" except in connection with alcoholic malt beverages sold in Washington and Alaska, and retained the protection of its good will and trade reputation represented by those trade-marks except for the limited infringement it authorized by Seattle. Seattle did not receive the right to assign its limited rights and even the Tax Court recognized

(R. 62, No. 11467) that "The right of alienation is one of the essential incidents of a right of property." The transaction was therefore not converted into a sale by Seattle's exercise of its option. See *Smith* v. *Dental Products Co.,* 140 F. 2d 140 (C. C. A. 7th).

It is not a valid argument to say that a "license" may in a loose sense be deemed a "sale." A "sale" within the meaning of the capital gains provisions of the Internal Revenue Code means a transaction which qualifies legally as a "sale" and is commonly understood to be encompassed by that word. *Hale* v. *Helvering,* 85 F. 2d 819, 822 (App. D. C.) A lease has been held by the Supreme Court not to constitute a "sale" for tax purposes and there is no more reason for assuming that a license should be deemed a sale. In *Burnet* v. *Harmel,* 287 U. S. 103, the taxpayer, the owner in fee of Texas oil lands, executed oil and gas leases of the lands for three years and as long thereafter as oil or gas should be produced from them by the lessee, in return for bonus payments aggregating $57,000 in cash and stipulated royalties measured by the production of oil and gas by the lessee. The Court noted that under Tax law an oil and gas lease operates immediately upon its execution to pass the title of the oil and gas in place to the lessee, but nevertheless held that the bonus payments aggregating $57,000 constituted ordinary income, not gain from the sale or exchange of a capital asset. Among other things, the Court stated (pp. 107, 112):

> Moreover, the statute speaks of a "sale," and these leases would not generally be de-

scribed as a "sale" of the mineral content of the soil, using the term either in its technical sense or as it is commonly understood. Nor would the payments made by lessee to lessor generally be denominated the purchase price of the oil and gas. By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill, and produce oil and gas, if found. Such operations with respect to a mine have been said to resemble a manufacturing business carried on by the use of the soil, to which the passing of title of the minerals is but an incident, rather than a sale of the land or of any interest in it or in its mineral content. [Citing cases.]

* * * * *

Bonus and royalties are both consideration for the lease, and are income of the lessor. *We cannot say that such payments by the lessee to the lessor, to be retained by him regardless of the production of any oil or gas, are any more to be taxed as capital gains than royalties which are measured by the actual production.* * * * [Italics supplied.]

Similarly, in *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308, it was held that stipulated royalties received for the assignment of a lease of coal lands were ordinary income, not the sale price of capital assets, despite the fact that under state law title to the coal in place passed to the lessor immediately upon execution of the lease. See also, *Esperson* v. *Commissioner,* 127 F. 2d 370, 372 (C. C. A. 5th); *Hogan* v. *Commissioner,* 141 F. 2d 92 (C. C. A. 5th), certiorari denied, 323

U. S. 710; *West* v. *Commissioner,* 150 F. 2d 723 (C. C. A. 5th), certiorari denied, 326 U. S. 795.

In these cases the lump sum payment, or advance royalty, was regarded as ordinary income in a situation where the lessor had merely retained some *economic* interest in the oil or gas or coal in place. Had there been an outright sale of the mineral interests; that is, a transfer of the absolute and general property in the oil and gas, the transaction would have been treated as a sale and the lump-sum payment the sale price. *Anderson* v. *Commissioner,* 81 F. 2d 457 (C. C. A. 10th).

In the present case, as in these other cases, Rainier retained an economic interest in (and also legal title to) the trade-marks "Rainier" and "Tacoma," and the arrangement with Seattle, instead of constituting a transfer of the absolute and general property represented by those trade-marks, was the grant of a right to a limited use of the trade-marks and hence a license. It is no answer to say that in the present case Seattle received an *exclusive* right within certain limits, for the lessor in these lease cases also had a separately identifiable interest—the certain percentage of the oil and gas in place represented by the retention of annual royalties.

The decisions involving copyrights are also pertinent. The bundle of rights conferred by a copyright includes motion picture, radio, book publishing, magazine and serial, etc., rights and these may be separately granted by the owner. It is well settled, however, that the grant of less than the entire bundle of

rights is the grant of a license and not a sale. *Rohmer* v. *Commissioner,* 153 F. 2d 61 (C. C. A. 2d), certiorari denied, 328 U. S. 862; *Sabatini* v. *Commissioner,* 98 F. 2d 753 (C. C. A. 2d); Judge Chase's opinion in *Goldsmith* v. *Commissioner,* 143 F. 2d 466 (C. C. A. 2d), certiorari denied, 323 U. S. 774; *M. Witmark & Sons* v. *Pastime Amusement Co.,* 298 Fed. 470 (E. D. S. Car.), affirmed, 2 F. 2d 1020 (C. C. A. 4th); *Goldwyn Pictures Corp.* v. *Howells Sales Co.,* 282 Fed. 9 (C. C. A. 2d), certiorari denied, 262 U. S. 755; *New Fiction Pub. Co.* v. *Star Co.,* 220 Fed. 994 (S. D. N. Y.); *Estate of Alexander Marton* v. *Commissioner,* 47 B. T. A. 184; cf. *Ehrlich* v. *Higgins,* 52 F. Supp. 805 (S. D. N. Y.). The reason, as stated in *Goldwyn Pictures Corp.* v. *Howells Sales Co., supra,* p. 11, is that the assignee or licensee, no matter what he is called, of, for example, the dramatic motion picture rights under a copyright, does not own the copyright and owns less than the whole. The consideration for one or more, but less than all, of the bundle of rights is considered a royalty for tax purposes even though received in a lump sum (*Rohmer* v. *Commissioner, supra; Sabatini* v. *Commissioner, supra*) and even though the grant is unlimited as to time (*Rohmer* v. *Commissioner, supra*). The property rights in a trade-mark are not subject to separation as readily as the property interests in a copyright, and indeed, as we have shown, the only "property" there is in a trade-mark attaches to the business whose good will and trade reputation it protects, but, assuming that the trade-mark may be separated into property rights,

these copyright cases plainly support the conclusion that there is no sale when less than the whole trade-mark is relinquished.

The trade-mark cases relied upon by the Tax Court are distinguishable. In *Andrew Jergens Co.* v. *Woodbury, Inc.,* 273 Fed. 952 (D. Del.), affirmed *per curiam,* 279 Fed. 1016 (C. C. A. 3d), certiorari denied, 260 U. S. 728, it was held that the grant of a trade-mark was "an assignment" rather than a license, but the grant of the trade-mark was absolute and complete in all respects except insofar as the assignor had heretofore given conflicting rights to other persons or corporations and except that the assignee was to have the right to use the trade-mark only so long as it continued in active business. Title quite plainly passed, subject to divestment by the happening of a condition subsequent—the discontinuance of active business by the assignee. *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.,* 269 Fed 796 (D. Del), involved an assignment to a prospective Coca-Cola bottler of the right to use Coca-Cola trade-marks. The only real question in the case was whether the contract of assignment was terminable at will by the parent company. In *Griggs, Cooper & Co.* v. *Erie Preserving Co.,* 131 Fed. 359 (W. D. N. Y.), there was a territorial and limited grant of trade-mark rights which were held sufficient to entitle the assignee's successor to maintain a suit for infringement of the trade-mark. The court did not state that there had been a sale of the trade-marks.

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F. Assuming that what Seattle received was "property" and that there may properly be a "sale" of less than the absolute and general property in a thing, the transaction between Rainier and Seattle still does not qualify as a "sale"

The Tax Court recognized that the grant of the exclusive use of a trade name in a limited territory does not dispose of the entire property in the grantor (R. 70–71, No. 11467) but apparently thought that such a grant might constitute a sale as being the equivalent of complete disposition within the limited territory granted. Except for the three trade-mark cases we have already distinguished, *supra,* and one other case which is easily distinguished,[8] the other decisions relied upon by the Tax Court consist of the opinion of Judges Learned Hand and Swan in *Goldsmith* v. *Commissioner,* 143 F. 2d 466 (C. C. A. 2d), certiorari denied, 323 U. S. 774, a copyright case in which it was immaterial whether there was a sale or a license, and several patent cases.

[8] *Jefferson Gas Coal Co.* v. *Commissioner,* 52 F. 2d 120 (C. C. A. 3d), involved the question whether an agreement was a contract of sale of coal lands or a lease. Under the agreement the assignee was obligated to make ten annual payments to the assignor on the basis of twelve cents a ton on a minimum tonnage amounting to $31,000, together with all taxes; if the minimum tonnage was not mined, the assignee was nevertheless to pay the twelve cents a ton on the minimum tonnage until the expiration of the so-called lease; if the assignee mined more than the minimum tonnage the assignee was to pay for the excess at twelve cents a ton and this excess would be credited on the total payments of $310,000 ($31,000 for ten years); and when the last payment was made the assignor was to deliver to the assignee, its successors and assigns, a fee simple title to the unmined coal in and under the coal lands in question. Since the assignee was required to pay the $310,000 within the ten years irrespective of whether it mined any coal, the agreement was construed as a contract of sale rather than a lease.

By statute a transfer of less than the whole patent may be the subject of sale. As the Supreme Court stated in *Waterman* v. *Mackenzie,* 138 U. S. 252, 255—

> Every patent issued under the laws of the United States for an invention or discovery contains "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the Territories thereof." Rev. Stat. § 4884. The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, *1st, the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States*; or, *2d, an undivided part or share of that exclusive right;* or, *3d, the exclusive right under the patent within and throughout a specified part of the United States.* Rev. Stat. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, * * *. *Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent*, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; * * * In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; * * * [Italics supplied.]

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See also, *Moore* v. *Marsh,* 7 Wall. 515; *Littlefield* v. *Perry,* 21 Wall. 205; *Excelsior Wooden Pipe Co.* v. *City of Seattle,* 117 Fed. 140 (C. C. A. 9th).

In *tax* cases which have involved the question whether there was a sale or license of a patent, the agreement involved was interpreted as transferring the full and complete title *to the whole patent,* in some cases on condition subsequent. *Commissioner* v. *Celanese Corp.,* 140 F. 2d 339 (App. D. C.); *General Aniline & Film Corp.* v. *Commissioner,* 139 F. 2d 759 (C. C. A. 2d); *Commissioner* v. *Hopkinson,* 126 F. 2d 406 (C. C. A. 2d); *Rotorite Corp.* v. *Commissioner,* 117 F. 2d 245 (C. C. A. 7th);[9] *Myers* v. *Commissioner,* 6 T. C. 258; cf. *Boesch* v. *Graff,* 133 U. S. 697; *Rude* v. *Westcott,* 130 U. S. 152; *Federal Laboratories, Inc.* v. *Commissioner,* 8 T. C. No. 132. Hence, the Tax Court was in error in the present case in supposing, for example, that *Commissioner* v. *Celanese Corp., supra,* supports the conclusion that there was a sale, not a license. In the *Celanese Corp.* case full title to the patent for the entire United States and its territories passed to the assignee on a condition subsequent. The condition subsequent, which consisted of the provisions under which the assignee might lose the patent, were stated not to affect the intent and purpose of the contract "to vest immediately in the Purchaser absolute title to the patents," as the Tax Court's quotation from the decision (R. 65, No. 11467) shows.

Parke, Davis & Co. v. *Commissioner,* 31 B. T. A. 427, relied upon by the Tax Court here (R. 63, No.

[9] In this case annual royalty payments were to apply on the purchase price at the taxpayer's option.

11467), there was a sale of an *undivided* interest in patents. In that case the assignor granted to the assignee the unqualified right to the patents and the assignor retained the same unqualified right to the patents, both parties agreeing not to sell the patents or license others to use them. The Tax Court stated that while the naked legal title remained in the assignor, in whose name infringement suits might be brought, such suits were to be for the benefit of both parties and their costs borne equally by both, and further, that the assignor had billed the assignee for, and the assignee had paid, one-half of all costs in respect of the perfecting of the patent applications and the filing of additional applications for patent. As the Tax Court stated in *Myers* v. *Commissioner, supra,* the decision in the *Parke, Davis & Co.* case was a holding that there was a sale of a one-half interest in the patents. But see *Federal Laboratories, Inc.* v. *Commissioner*, 8 T. C. No. 132, where it was stated that the grant of the entire interest in the patent is a license, not a sale, where the agreement provides that the grantor retains legal title.

While there may be a sale of the exclusive right under a patent within and throughout a specified part of the United States, as distinguished from the sale of an undivided interest in the whole, a license and not a sale results if the entire and exclusive interest for that territory is not granted to the assignee. This is clear from the decision in *Waterman* v. *Mackenzie, supra,* in which it was stated that there could be such a sale but in which the agreement was not limited territorially. In that case it was

held that the agreement involved constituted a license rather than an assignment because the assignee received the "sole and exclusive" right *to manufacture and sell* fountain penholders containing the patented improvement but did not receive the right *to use* such penholders, at least if manufactured by third persons. (P. 257.) As the Supreme Court stated (p. 256)—

> the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license. Such, for instance, is a grant of "the full and exclusive right to make and vend" within a certain district, reserving to the grantor the right to make within the district, to be sold outside of it. *Gayler* v. *Wilder,* above cited. So is a grant of "the exclusive right to make and use," but not to sell, patented machines within a certain district. *Mitchell* v. *Hawley,* 16 Wall. 544. So is an instrument granting "the sole right and privilege of manufacturing and selling" patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. *Hayward* v. *Andrews,* 106 U. S. 672. See also *Oliver* v. *Rumford Chemical Works,* 109 U. S. 75.

In *United States* v. *Gen. Elec. Co.,* 272 U. S. 476, 489, the Supreme Court reiterated substantially the same

language. *Excelsior Wooden Pipe Co.* v. *City of Seattle,* 117 Fed. 140, decided by this Court, is a case similar to *Waterman* v. *Mackenzie, supra.* In that case this Court held that, because the grant was not complete, there was a license and not a sale of patent rights within certain described territory, which included the State of Washington.

Thus, while there may be a sale of an absolute undivided interest in the whole patent for the entire United States and its territories or a sale of the absolute interest in the patent for a given territory, the transfer of either an undivided or a territorial interest must be absolute and confer complete ownership of that interest in order to constitute a sale. In the present case there was, of course, no transfer of an undivided interest in the trade-marks "Ranier" and "Tacoma"; the only question which could arise in view of these patent cases is whether there was a transfer of absolute and complete ownership of the trade-marks within and throughout Washington and Alaska.

Seattle did not, of course, receive absolute and complete ownership of the trade-marks "Rainier" and "Tacoma" within and throughout Washington and Alaska. It received the right to use those trade-marks in Washington and Alaska only in the manufacture and sale of beer, ale, and other alcoholic malt beverages, Rainier retaining the right to use the trade-marks in the same territory on nonalcoholic beverages. A sale connotes a title or interest which is transferable and Seattle not only did not have

the right to transfer the right to use the trade-marks in Washington and Alaska but could not even transfer its own limited right to use the trade-marks on alcoholic malt beverages. While Rainier, on the other hand, had given Seattle an exclusive right to use the trade-marks in Washington and Alaska in connection with the manufacture and sale of alcoholic malt beverages, Rainier still had control over the trade-marks in Washington and Alaska for use in connection with the manufacture and sale of nonalcoholic beverages and Rainier, not Seattle, was to maintain the registrations on the trade-marks in Washington and Alaska. Seattle's rights were also probably forfeitable, as we have already indicated, but, whether they were or not, what Seattle received from Rainier was a far cry from the absolute transfer of title for a particular area involved in the patent cases. As in the case of the patents involved in *Waterman* v. *Mackenzie, supra,* and *Excelsior Wooden Pipe Co.* v. *City of Seattle, supra,* Seattle did not receive all of the rights in the trade-marks in a particular area and the transaction between Rainier and Seattle therefore resulted in a license, not a sale.

We know of no authorities which even indicate that there may be a sale of less than complete ownership for a given territory as to any type of property, but assuming that there could be a sale of trade-mark rights for a specified territory for a limited purpose, as distinguished from all purposes, the transaction between Rainier and Seattle still would not qualify as a sale. In order to constitute a sale, the transfer

of rights for the specified territory for the limited purpose would have to confer complete ownership on the transferee in respect of the trade-mark rights for that territory and purpose and, since Seattle did not receive the power to license or sublicense, or otherwise to transfer to others the rights it received, it received nothing from Rainier which constituted ownership even if it be assumed that the forfeiture provisions were no longer effective after the exercise of the option or were mere conditions subsequent.

Goldsmith v. *Commissioner,* 143 F. 2d 466 (C. C. A. 2d), certiorari denied, 323 U. S. 774, a copyright case, is not in conflict. The taxpayer there had made an assignment of the exclusive motion-picture rights in a copyrighted play and the question was whether the consideration therefor received by the taxpayer was to be treated as ordinary income or gain from the sale of a capital asset. Judge Chase was of the opinion that the sums received by the taxpayer were royalties and taxable as ordinary income for that reason. Judges Learned Hand and Swan agreed that the sums received were taxable as ordinary income but differed from Judge Chase in their reasoning. They were of the opinion that the exclusive license granted by the taxpayer was "property," that "It does not unduly strain the meaning of 'sale' to make it include an exclusive license" (p. 468), and that the grant was a sale within the meaning of Section 117 of the Code. They concluded, however, that the sale was not of a capital asset, because the copyrighted play was held by the taxpayer for sale to

customers in the ordinary course of his business as a playwright and therefore came within one of the express exceptions to the definition of a capital asset. Thus, as the same court later stated in *Rohmer* v. *Commissioner, supra,* p. 65, relative to the decision in the *Goldsmith* case—

> As the legal result was the same in that case, whichever of the two rationales was accepted, the choice of rationale could there have no practical effect. * * *

The opinion of Judges Learned Hand and Swan in the *Goldsmith* case does not in any event support the conclusion that there was a sale in the present case. In the first place, we are there dealing with trade-marks, as to which there are no separable property rights as in a copyright. But at any rate the holding in the *Goldsmith* case was with reference to an "exclusive" license which was truly exclusive. Unlike the present case, the grant used the words "grant and assign", as Judge Hand noted, and the grant was not limited territorially or in any other way except that it applied only to the motion picture rights. Unlike the present case, the taxpayer there specifically granted to the assignee the right to assign the motion picture rights to others and agreed to permit the assignee to use his name, for its own benefit and at its own risk and expense, to enjoin infringements of any of the rights granted and to recover damages for infringement. The decision therefore stands only for the proposition that there may be, under proper circumstances, a sale of one or more of the rights covered by a copyright.

II

Assuming that there was a sale, the full amount of obsolescence allowed by the Commissioner in 1918 through 1920, rather than the amount from which Rainier received a tax benefit, should be taken into account in adjusting Rainier's basis under Section 113 (b) (1) (B) of the Code

Assuming, contrary to our argument under Point I, *supra*, that the Tax Court was correct in concluding that the $1,000,000 Rainier received from Seattle was the sale price of a capital asset, a question is presented in connection with the determination of the amount of Rainier's gain from the so-called sale. Under Section 111 (a) of the Code (Appendix, *infra*) the gain is the excess of the amount realized ($1,000,000) over the adjusted basis provided in Section 113 (b) (Appendix, *infra*). Since Rainier held the trade names "Rainier" and "Tacoma" prior to March 1, 1913, its *unadjusted* basis is the March 1, 1913, value of the trade names for Washington and Alaska (Section 113 (a) (14), Appendix, *infra*), which the Tax Court found to be $514,142 (R. 59). Section 113 (b) (1) (B) requires that this amount be adjusted—

> (B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, * * * to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws. * * *

As the Tax Court found (R. 60), Rainier filed a claim for abatement of taxes in 1919 based on a claim of obsolescence of good will due to the advent of prohibition. The claim was in the amount of $542,240.27, which represented Rainier's computation

of its good will as of March 1, 1913. Pursuant to this claim, the Commissioner computed the March 1, 1913, value of Rainier's good will to be $406,680.20 and allowed Rainier obsolescence on that amount, allocating $345,061.95 to 1918; $59,153.48 to 1919; and $2,464.77 to 1920. By reason of this allowance, Rainier received a total tax benefit for obsolescence in the amount of $138,137.40. The Tax Court held that this amount, and not the full amount of obsolescence allowed, was to be taken into consideration in arriving at Rainier's adjusted basis for the so-called sale of the trade names "Rainier" and "Tacoma" to Seattle; that is, that Rainier's adjusted basis for the trade names (which represented good will) was their March 1, 1913, value, $514,142 minus $138,137.40, rather than $514,142 minus $406,680.20 (R. 67–72). It is our position that the full $406,680.20 should be deducted from the March 1, 1913, value of $514,142 if the $1,000,000 Rainier received from Seattle is to be treated as capital gain rather than ordinary income.

There is no support in the Tax Court's findings (R. 60) for the Tax Court's intimation (R. 72) that Rainier had not "claimed" the full amount of obsolescence. No formal claim for abatement of taxes was made for 1918 and 1920, as it was for 1919, but the 1919 claim was for obsolescence in an amount greater than the Commissioner allowed for the three years 1918–1920, inclusive. Pursuant to this claim, Rainier's tax returns for 1918–1920, inclusive, were revised and its income for each of those years computed on the basis of an allowance for obsolescence.

As a result, Rainier received tax benefits for both 1918 and 1919. Under such circumstances, the amount of obsolescence allowed by the Commissioner must be deemed to have been claimed by Rainier and "allowed" by the Commissioner within the meaning of the statute. As the Supreme Court stated in *Virginian Hotel Co.* v. *Helvering,* 319 U. S. 523, 527–528, rehearing denied, 320 U. S. 810, where obsolescence was simply deducted by the taxpayer in his returns and the Commissioner had not even, as here, taken affirmative action at the instance of the taxpayer—

> "Allowed" connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them. Income tax returns entail numerous deductions. If the deductions are not challenged, they certainly are "allowed" since tax liability is then determined on the basis of the returns. Apart from contested cases, that is indeed the only way in which deductions are "allowed." And when all deductions are treated alike by the taxpayer and by the Commissioner, it is difficult to see why some items may be said to be "allowed" and others not "allowed." It would take clear and compelling indications for us to conclude that "allowed" as used in § 113 (b) (1) (B) means something different than it does in the general setting of the revenue acts. * * *

The fact that Rainier did not receive a tax benefit in the *full* amount allowed by the Commissioner as obsolescence has no bearing on the question whether

the full amount was "allowed" within the meaning of the statute. In *Virginian Hotel Co.* v. *Helvering, supra,* the taxpayer had from 1927 through 1937 deducted depreciation on equipment on a straight line percentage basis. The Commissioner made no objection to these deductions but in 1938 determined that the useful life of the equipment was longer than claimed and that lower depreciation rates should be used. In determining the basis for 1938 and subsequent years under the same statute involved in the present case, the Commissioner subtracted the amounts of depreciation claimed in prior years, although those amounts were excessive as it later appeared. It was there stipulated that for the prior years 1931 through 1936 none of the claimed depreciation had reduced the taxpayer's taxable income and, accordingly, the taxpayer contended that the amount of depreciation claimed for the years 1931 through 1936 in excess of the amount properly "allowable" should not be subtracted from the depreciation basis, since it had not served to reduce its taxable income in those years. The Supreme Court rejected this contention, holding that the depreciation basis was properly reduced by the excessive amounts claimed in prior years, such amounts having been allowed."

That the full amount of obsolescence was "allowed" even though no obsolescence was "allowable" is illustrated by other decisions. In *Belknap* v. *United States,* 55 F. Supp. 90 (W. D. Ky.), which involved gain from the sale of a flock of sheep where the tax-

payer had claimed depreciation in some years and not in others, it was stated (p. 97):

> Since the flock of sheep in question was not losing its usefulness but was being maintained through the methods adopted by the taxpayer the flock was not the type of personal property subject to an annual depreciation allowance within the provisions of the Regulations above referred to. Also since the sheep were acquired for purposes in addition to breeding, namely, for the sale of wool and for the resale of some of the sheep themselves from time to time, the taxpayer was not properly entitled to a reasonable allowance for depreciation allowed to farmers under the provisions of Article 23 (1) (10) of the Regulations above referred to. Since depreciation on the flock of sheep was not allowable to the taxpayer annually, and as a matter of fact it was not claimed for the years in question, the basis for determining the gain on the sale of the sheep in 1938 was their cost, less the depreciation which was erroneously taken and allowed for the years 1930 and 1931. * * *

In *Old Colony Trust Co.* v. *White,* 34 F. 2d 448 (D. Mass.), it was contended that depreciation was not to be taken into account in determining the gain from the sale of trust property, because the trustee could not legally deduct depreciation in his annual returns. The contention was rejected. Similarly, in *Hall* v. *United States,* 43 F. Supp. 130 (C. Cls.), certiorari denied, 316 U. S. 664, depreciation on leaseholds held in trust was denied by the Commissioner for years prior to the time depreciation as to lease-

holds was allowed by statute and it was nevertheless held that, in computing gain from the sale of the leaseholds, the March 1, 1913, basis was to be reduced by the amount of depreciation from March 1, 1913, to the date of sale. Cf. *Helvering* v. *Owens,* 305 U. S. 468; *Burnet* v. *Thompson Oil & Gas Co.,* 283 U. S. 301.

CONCLUSION

The Tax Court's holding that the $1,000,000 in promissory notes received by Rainier in 1940 from Seattle constituted the sale price of a capital asset, rather than ordinary income, is incorrect and should be reversed. If the Court concludes that the Tax Court's holding on that issue is correct, the Tax Court's decision is nevertheless erroneous on the obsolescence issue and should, for that reason, be reversed.

Respectfully submitted.

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AUGUST, 1947.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from * * * trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 1940 ed., Sec. 22.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain * * *.

(26 U. S. C. 1940 ed., Sec. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss determined under section 111, shall be recognized, except as hereinafter provided in this section.

(26 U. S. C. 1940 ed., Sec. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

(14) *Property Acquired Before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General Rule.*—Proper adjustment in respect of the property shall in all cases be made—

* * * * *

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, * * * to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws. * * *

(26 U. S. C. 1940 ed., Sec. 113.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1); * * *

* * * * *

(4) *Long-Term Capital Gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing net income; * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 117.)

Treasury Regulations 103, as promulgated under the Internal Revenue Code:

Sec. 19.22(a)–10. *Sale of Good Will.*—Gain or loss from a sale of good will results only when the business, or a part of it, to which the good will attaches is sold, in which case the gain or loss will be determined by comparing the sale price with the cost or other basis of the assets, including good will. (See sections 19.111–1, 19.113 (a) (14)–1, and 19.113 (b) (1)–1 to 19.113 (b) (3)–2, inclusive.) If specific payment was not made for good will there can be no deductible loss with respect thereto, but gain may be realized from the sale of good will built up through expenditures which have been currently deducted. * * *

Sec. 19.113 (b) (1)–1. *Adjusted basis: General rule.*—

* * * * *

The cost or other basis shall be properly adjusted for any expenditure, receipt, loss, or other item, * * *

* * * * *

The cost or other basis must also be decreased by the amount of the deductions for exhaustion, wear and tear, obsolescence, * * * to the extent such deductions have in respect to any period since February 28, 1913, been allowed (but such decrease shall not be less than the amount of deductions allowable) under chapter 1 or prior income tax laws. The adjustment

required for any taxable year or period is the amount allowed or the amount allowable for such year or period under the law applicable thereto, whichever is the greater amount. * * *

* * * * *

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No. 11,547

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Commissioner of Internal Revenue,

Petitioner,

vs.

Rainier Brewing Company, a Corporation,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

BRIEF FOR RESPONDENT.

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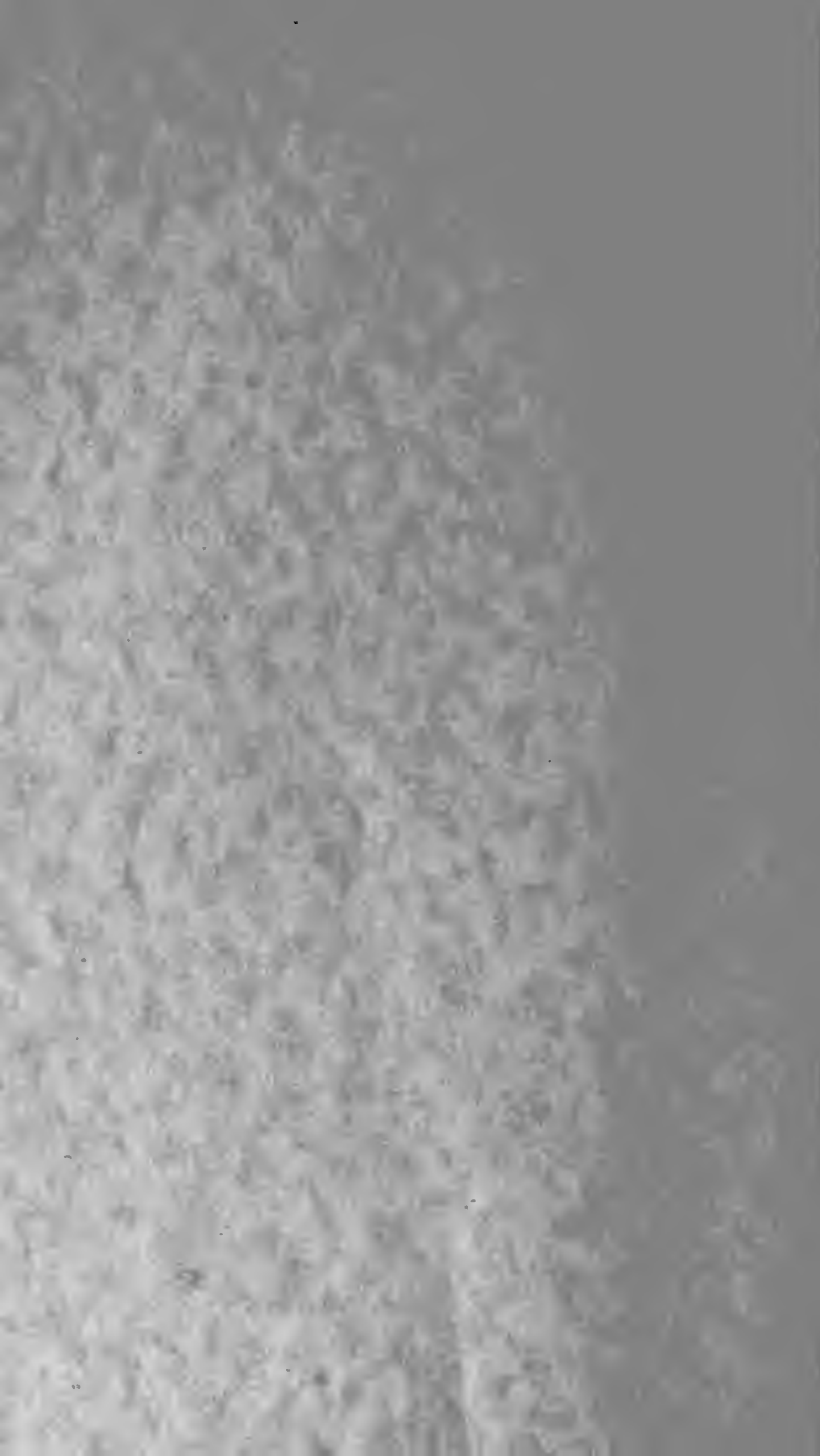

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No. 11,547

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

RAINIER BREWING COMPANY, a Corporation,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

BRIEF FOR RESPONDENT.

Opinion Below.

The Findings of Fact and Opinion of The Tax Court [R. 37-78] are reported at 7 T. C. 162.

Jurisdiction.

On March 9, 1944, the petitioner, Commissioner of Internal Revenue (hereinafter referred to as the Commissioner), mailed to the respondent (hereinafter referred to as Rainier or the taxpayer) a notice of deficiency proposing deficiencies in income tax, declared value excess profits tax, and excess profits tax for the calendar year 1940 aggregating $539,888.12 and a deficiency in excess profits tax for the calendar year 1941 in the sum of $26,119.92. [R. 16-30.] On May 12, 1944, pursuant to Section 272 of the Internal Revenue Code and within the 90-day period prescribed by that Section, Rainier

filed with The Tax Court its petition for redetermination of said deficiencies. [R. 5-30.] The petition was heard on July 19-21, 1945, and The Tax Court entered its decision on August 12, 1946. [R. 78-9.] The Commissioner filed his petition for review on November 5, 1946, and served notices and copies thereof on November 8 and 12, 1946, pursuant to Section 1142 of the Internal Revenue Code. [R. 79-86.] The jurisdiction of this Court rests upon Section 1141 of the Code.

Questions Presented.

1. Whether there is warrant in the record for The Tax Court's finding of fact that a sale of a capital asset took place in 1940 when Seattle Brewing & Malting Company delivered to Rainier $1,000,000.00 in promissory notes in consideration for the grant of the sole and exclusive perpetual right and license to manufacture and sell beer, ale and other alcoholic malt beverages under the trade name "Rainier"* in the State of Washington and Territory of Alaska; and whether The Tax Court employed correct legal principles in concluding that this transaction constituted a sale rather than a mere license.

2. Whether The Tax Court was correct in determining from the record that the March 1, 1913 value of Rainier's trade name and good will in Washington and Alaska should be reduced only by the sum of $138,137.40 as a result of the erroneous allowance of obsolescence.

---

*The transaction also involved the name "Tacoma," but this name was insignificant, was not used by the Seattle Company [R. 13 and 33] and will be disregarded in this brief. See the footnote in the Commissioner's brief, page 6.

STATEMENT OF THE CASE.

First Issue.

The statement regarding the first issue on pages 3 to 19 of the Commissioner's brief is taken largely from The Tax Court's findings of fact and is accepted by Rainier as a correct recital with the following exceptions:

1. The reference on page 14, to the amendment dated November 27, 1935, and the paragraph quoted therefrom do not appear in The Tax Court's findings. The amendment purports to grant a special right to Rainier to sell "Rainier Special Export" beer to the Alaska Commercial Company—sales which Rainer agreed to discontinue within 10 days after demand by Seattle. The amendment further provided that Rainier would pay over and account to Seattle for the net profit resulting from such sales; that Rainier had actually made such sales from July 1, 1935, the effective date of the contract, to November 27, 1935, the date of the amendment, and that Rainier would turn over to Seattle the net profit resulting therefrom and Seattle would waive any violation of the agreement of July 1, 1935, resulting from such sales. [R. 690-691.] Hence this amendment was a confirmation, and not a derogation, of Seattle's rights under the agreement of April 23, 1935.

2. At the conclusion of the Commissioner's statement on this issue (Br. 18-19) reference is made to The Tax Court's finding that the transaction constituted the sale and acquisition of a capital asset, and it is stated that The Tax Court relied upon its decision in No. 11,467, *Seattle Brewing & Malting Company v. Commissioner*, 6 T. C. 856. We do not agree with the Commissioner's statement that The Tax Court *erroneously assumed* that

since the transaction had been held to be the acquisition of a capital asset in the *Seattle* case it necessarily followed that Rainier had sold a capital asset. As we shall show hereinafter, *The Tax Court made no such assumption* at all, but in fact held, not only in this case but equally in the *Seattle* case, that insofar as both parties to the contract were concerned the transaction constituted a sale rather than a license and the consideration in question represented selling price rather than prepayment of royalties.

3. Bearing upon the intent of the parties as to whether the forfeiture provisions of the agreement would be effective *after* the exercise of the option, the following facts are significant:

On July 18, 1935, less than three months after the agreement was executed, the parties entered into a supplemental agreement [Ex. 3, R. 632-645] which recites "that in order to more fully and correctly set forth the intention and understanding of the parties" [R. 637], paragraph Twelfth of the agreement was amended to read as follows:

> "It is the purpose, understanding and intention of the parties hereto that at all times and as long as this Agreement remains in force, the said real property [the Seattle plant], or the proceeds realized upon the sale thereof (to the extent of not to exceed Two Hundred Fifty Thousand Dollars ($250,000.00) or cash, lawful money of the United States equal and equivalent to the fair value of the property and improvements at the time of loss (not to exceed, however, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) shall stand as security for the prompt and faithful performance by Century

> of all of its obligations under this Agreement, and in the event of default, be transferred and delivered to Rainier as and for liquidated damages." [R. 640.]

The next day, July 19, 1935, in order to carry out this intention, a trust indenture was executed [Ex. 6, R. 656-685], which recited that it was executed to carry out the provisions of the contract of April 23, 1935, and that Rainier would not have executed that contract unless Century had agreed to pledge the plant as security "for the prompt and faithful performance * * * of all of the terms and provisions contained in said Agreement * * *." [R. 659-660.] Article V of the trust indenture provided in part as follows [R. 672-673]:

> "*Section 1.* If the Grantor [Century] shall well and truly perform and observe each and all of the covenants, agreements and conditions of said Agreement, dated April 23, 1935, * * * or if the Grantor shall avail itself of the option expressed in paragraph THIRTEENTH of said Agreement dated April 23, 1935, and shall cause the payment to the Beneficiary in cash of the sum therein provided to be paid in the event of the exercise of such option, then and in that case, the estate, right, title and interest of the Trustee hereunder shall cease and determine and the property, premises, rights and interests hereby conveyed shall revert to the Grantor * * *."

Upon payment of the last of the five notes the trust was terminated and the Seattle plant was released to the Seattle Company. [R. 709.] There was thus ended, in accordance with the terms of the trust executed on July 19, 1935, the possibility of liquidated damages being forfeited under paragraph Twenty-Second, quoted on pages 12 and 13 of the Commissioner's brief.

4. Bearing upon the intention of the parties at or about the time the option was exercised in 1940, before any controversies arose as to the effect of the contract for tax purposes, the following facts are significant:

In the official "Annual Statement" of Rainier Brewing Company to its stockholders for the year ended December 31, 1940, dated prior to April 18, 1941, signed by Mr. Joseph Goldie, President, the following report was made:

> "There were received during 1940 five installment notes of $200,000.00 each, maturing July 1, 1941, 1942, 1943, 1944, and 1945. * * * The total of the notes, namely $1,000,000.00, was received in consideration of the sale of certain intangible assets * * *." [Ex. 34, R. 808-14, and particularly R. 810.]

A formal prepared statement was issued on April 11, 1940, by Mr. Emil G. Sick, President of the Seattle Company, which was quoted verbatim on April 12, 1940, in the Business and Finance Section of the Seattle Post-Intelligencer in an article by the Financial Editor of that newspaper. [Ex. 39, R. 826.] The statement issued by Mr. Sick, shortly before the exercise of the option, was as follows:

> "In April of 1935 the Century Brewing Company purchased the old Rainier plant at Georgetown and likewise took over the business of the Rainier Brewing Company of San Francisco in the State of Washington and Alaska.
>
> "* * * A contract was made with the Rainier Brewing Company of San Francisco to pay Rainier

a minimum of $75,000 a year and a certain extra amount on barrelage of over 100,000.

"This payment was to extend for five years and currently run around $100,000 a year. *Under the contract the Seattle Brewing and Malting Company is now privileged at the end of the fifth year to make outright purchase for one million dollars.*" (Emphasis added.)

The article stated that a special meeting of Seattle's stockholders would be held in the next two weeks "to exercise the company's option on the purchase of all rights connected with its manufacture and distribution of Rainier beer"; the company was entertaining alternative plans, either to make "an outright cash purchase for one million dollars (the amount it would cost to exercise the option)" or to give Rainier five notes for $200,000.00 each; and the financing plans to carry out the deal contemplate issuance of new stock to Seattle's shareholders on terms described by Mr. Sick as very reasonable.

The identical article, quoting Mr. Sick's statement verbatim, also appeared in the trade magazine "Brewer and Dispenser." [Ex. 40, R. 827.]

Other relevant evidence included two reports by Dun & Bradstreet, one dated August 26, 1940, covering Rainier Brewing Company [Ex. 35, R. 815-19] containing the following statement [R. 818]:

"* * * An additional favorable development has been the exercising by Seattle Brewing & Malting Co. of its *option to purchase outright* the rights to

> use the name of Rainier in the Pacific Northwest * * *." (Emphasis added.)

The other, dated August 14, 1941, covering Seattle Brewing & Malting Company [Ex. 36, R. 820-24], included the following statements [R. 823]:

> "* * * At the same time [in 1940], rights to use of the formula and brand name of 'Rainier' beer in Washington and Alaska previously utilized on a royalty basis, *were purchased* for $1,000,000, paying part cash with the balance due in five years. Additional capital stock was sold, with the proceeds of $600,292.50 in par and premiums being used to finance a portion of the purchase of the 'Rainier' rights and the rest added to working funds." (Emphasis added.)

Second Issue.

The Commissioner's statement of facts on the second issue is taken from The Tax Court's findings. The stipulation upon which these findings were based showed that obsolescence was claimed for the year 1919 only in the sum of $174,188.84. [R. 126-7.] No other obsolescence was ever claimed by the taxpayer. The Tax Court found, as part of its opinion [R. 72], that obsolescence had not been allowed beyond the extent determined by it ($138,137.40). See *American Box Shook Exp. Assn. v. Commissioner,* 9 Cir., 156 F. (2d) 629, 631, to the effect that the findings may be read together with the opinion to ascertain what The Tax Court found as facts.

SUMMARY OF ARGUMENT.

First Issue.

The two contracting parties expressed their intent and understanding, both in 1935 and when the option was exercised in 1940, that exercise of the option and payment of the million dollars would constitute a *purchase* by Seattle and a *sale* by Rainier of the trade name "Rainier" for use in connection with beer, ale and other alcoholic malt beverages in Washington and Alaska. This expression of intent on the part of the Seattle Company in 1940 took the form of a public announcement by its president of a proposed issuance and sale of new stock in order to finance "the purchase."

The property in a trade name consists of the right to use it only in the market where that name has become associated with a product, coupled with the corresponding duty on the part of others not to use the same name on the same or similar goods in the same area, to the confusion of the public and detriment of the owner of the name. The property in a name grows out of its use, and the right of user remains at all times the fundamental property interest in the name. It exists as property only in connection with a going business and hence only in the areas where that business is conducted. In other words, the property in a name is definitely linked to geography, for beyond the localities where it has achieved significance in a business it does not exist. In these two aspects—use and geographical limitation—a trade name is basically different from either a copyright or a patent, the issuance of which grants to the owner immediate and nation-wide property rights that continue to be owned whether actively exploited or withheld from use.

The same trade name used on the same goods may be owned at the same time by two different companies operating in different geographcial areas. *United Drug Co. v. Rectanus Co.,* 248 U. S. 90, 63 L. Ed. 141; *Hanover Star Milling Co. v. Metcalf,* 240 U. S. 403, 63 L. Ed. 713; *Esso, Inc. v. Standard Oil Co.,* 8 Cir., 98 F. (2d) 1, 7. Hence, there is no reason why, as a matter of law, the owner of a name used in a business cannot sell the name along with the business in a given locality, while retaining its business elsewhere. Similarly, the ownership of a trade name may be granted to another for use in the sale of certain products or in carrying on a distinct phase of a business, while the name is retained for use in connection with other products or another phase of the business. *American Crayon Co. v. Prang Co.,* 3 Cir., 38 F. (2d) 448; *Coca-Cola Bottling Co. v. Coca-Cola Co.,* D. C. Del., 269 Fed. 796; *Canadian Club Beverage Co. v. Canadian Club Corp.,* S. C. Mass., 168 N. E. 106.

When a company withdraws from business in a given territory and receives $1,000,000.00 for the perpetual and exclusive right to the use of its name by another company, which thereafter carries on the business from which the first company withdrew, such a transaction as a practical matter and as the term is commonly understood is a sale or tantamount to a sale of the business, its good will and the name that symbolizes the good will. It was so regarded and characterized by both parties to the contract in the instant cases long before any dispute arose regarding tax consequences. It is immaterial whether the business that is transferred consists of manufacturing or merely selling and marketing. Furthermore, a sole, perpetual and exclusive right to use a trade name is treated, as a matter of law, as an assignment of the

property in the name—this for the reason that the "right to use" is practically identical with "property" in a name. Such identity is reflected in the phrase used by the Supreme Court in *Delaware and Hudson Canal Co. v. Clark,* 13 Wall. 311, 20 L. Ed. 581, 583:

> "* * * Property in a trademark, or rather in the use of a trademark or a name, * * *."

Particularly is such a transaction equivalent to a sale in the practical field of taxation, for the assignor has conveyed *permanently* the entire beneficial interest in the name, and unless permitted to recoup his capital investment out of the lump-sum consideration he will lose it forever. The beneficial ownership and economic gain to be derived from the name in the given locality are gone. Refinements of title and legal niceties cannot obscure the reality of transfer of the practical benefits and risks of ownership.

Hence, The Tax Court was correct, both factually and legally, in construing the transaction as a sale rather than a mere license. Moreover, its findings and conclusions have warrant in the record and accordingly may not be disturbed. *Dobson v. Commissioner,* 320 U. S. 489, 88 L. Ed. 248, rehearing denied, 321 U. S. 231, 88 L. Ed. 691; *Choate v. Commissioner,* 324 U. S. 1, 89 L. Ed. 653.

Second Issue.

Obsolescence of good will was not "allowable" as a result of the adoption of national prohibition in 1920. Such obsolescence was claimed as a deduction by Rainier for 1919 in the sum of $174,188.84. No other amount of obsolescence was ever claimed by Rainier. The Com-

missioner allowed $59,153.48 as a deduction for obsolescence in 1919, and to this extent the taxpayer's basis must be reduced under Section 113(b)(1)(B) of the Code. The Commissioner then determined that the great bulk of the good will loss, as computed by him ($345,-061.95), was "allocable" to 1918. The taxpayer had not claimed that amount as a deduction for obsolescence for 1918 or for any other year. Its return for 1918 showed a net loss wtihout any deduction for obsolescence. The Tax Court was obviously correct in determining that the gratuitous unilateral determination or allocation of an amount by the Commissioner does not constitute the "allowance" of a deduction where it has never been claimed by the taxpayer. The Commissioner may not by his own action thus penalize a taxpayer; and on a subsequent sale of the property the taxpayer is entitled to recover its basis undiminished by such an "allocation" on his part. Rainier, however, seeks no unfair tax advantage and therefore concedes here, as it did below, that account should be taken of the benefit that accrued to it as a result of a combination of the Commissioner's allocation to 1918 and his recalculation of Rainier's income for that year, to show a net income of $78,983.92 instead of a net loss. The Tax Court's conclusion on this issue has warrant in the record and embodies principles of tax accounting substantially identical with those involved in the *Dobson* case itself. The Tax Court's determination of what constituted a proper adjustment of basis under Section 113(b)(1)(A) of the Code was held to be conclusive in the *Dobson* case. The same principle applies here to its determination of the proper adjustment of basis under Section 113(b)(1)(B).

ARGUMENT.

First Issue.

Introductory.

On the American scene a right to sell goods under an established trade name may be a property right of great value. This was true of the right to sell beer under the name "Rainier" in Washington and Alaska at March 1, 1913, for The Tax Court valued the right at $514,-142.00. The Commissioner does not challenge that finding, and the Internal Revenue Code ordains that the value of property on that date shall, for tax purposes, be deemed to be its basis, just as if cash in that amount had been put out to acquire the asset.

And the right to sell beer under the name "Rainier" in Washington and Alaska was likewise valuable in 1940, as evidenced by the willingness of Seattle Brewing & Malting Co. to pay Rainier $1,000,000.00 in notes for the exclusive and perpetual exercise of such right.

Rainier, of course, has paid income tax upon the gain it admittedly realized on the transaction, measured by the difference between the million dollars received and the basis of the property adjusted in accordance with The Tax Court's decision. The Commissioner, however, would calculate Rainier's 1940 tax by disregarding its basis of $514,142.00 and subject every penny of the million dollars not only to normal tax and surtax but to the high war-time excess profits tax. Thus, on a transaction resulting in gain to Rainier of $623,995.40 as determined by The Tax Court, the Commissioner seeks to collect from it a tax of $539,888.12, or 86.52% of the gain.

The theory upon which such an exhorbitant tax is said to be justified is that Rainier did not sell anything; and a taxpayer can take account of its cost or other basis only in the event of a sale or exchange. At the same time the Commissioner insists that Seattle cannot deduct the million dollars because it was a capital outlay—the purchase price of a capital asset.

In Part A of his brief (pp. 25-30) the Commissioner attempts to justify this inconsistent result by saying that the million dollars *could constitute* "an advance lump sum royalty" taxable as ordinary income to Rainier, even though to Seattle the payment would represent the non-deductible purchase price of a *license having an indefinite life*. Part B of his brief (pp. 30-37) attempts to avoid the *Dobson* doctrine by creating the impression that The Tax Court fell unwittingly into error in deciding the *Rainier* case solely on the authority of its decision in the *Seattle* case. The *Seattle* case, according to the Commissioner's present argument, did not decide whether the transaction was a sale as opposed to a mere license, but it really intended to hold only that Seattle had acquired a license with an indefinite life; hence, in finding that the transaction amounted to a sale in the *Rainier* case, The Tax Court failed to recognize that the lump-sum royalty, although non-deductible, could be taxed as ordinary income to Rainier.

The Commissioner states that The Tax Court did not have a clear understanding of the effect of its decision in the *Seattle* case (Br. 31); and he goes so far as to say that The Tax Court in that case "was not required to and did not specifically hold that there was a sale." (Br. 32.) He also alleges that a "sale" to The Tax Court

meant only the acquisition of a capital asset (*i. e.,* an indefinite license) by Seattle. (Br. 33.)

The fact of the matter is that The Tax Court *in the Seattle case* expressly held that exercise of the option effected a sale; it expressly held that the transaction *was not a license* after exercise of the option; it expressly held that the payment did not constitute a royalty or an advance royalty; it expressly held that the payment represented not only purchase price to Seattle but selling price to Rainier; and, in reliance upon authorities cited in the Commissioner's own brief—authorities which the Commissioner now seeks to brush aside as distinguishable (Br. 61)—The Tax Court expressly held that the grant for a lump-sum consideration of a perpetual, exclusive license to use a trade name is tantamount to a sale of the property in the name.

The Commissioner perhaps is not to be criticized for taking inconsistent positions in discharging his duty to protect the public revenue; but it appears unusual, at least, for him to argue successfully in a lower court that decided precedents mean one thing, and then, before an Appellate Court reviewing the same transaction, to contend that they do not support the proposition for which he cited them below.

In view of the Commissioner's argument we shall present this brief in the following form: (1) an analysis of The Tax Court's actual holdings in both cases; (2) citations and argument showing the correctness of the Court's holdings; and (3) a reply to the Commissioner's other arguments on brief.

I.

The Tax Court, in the Seattle Case as in the Rainier Case, Held That the Transaction Was a Sale and Not a License, That the Million Dollars Constituted Purchase Price and Not Advance Royalty.

Bearing on the Commissioner's argument that The Tax Court failed to distinguish between the issue in the *Rainier* case and its actual decision in the *Seattle* case, the following facts are significant:

The *Seattle* case was heard by Judge Arthur J. Mellott at Seattle, Washington, on October 31, 1944. [R. 79 in No. 11,467.] Briefs were thereafter filed, including an *amicus curiae* brief by Rainier setting forth its contention that exercise of the option effected a sale of property. [See R. 141 and 147 in No. 11,547.]

The *Rainier* case came on for hearing in San Francisco, California, before Judge Marion J. Harron, and the trial consumed three days beginning July 19, 1945. The interconnection between both cases was brought out in the opening statements by counsel for both parties and was thoroughly discussed throughout the hearing. Upon questioning by the Court at the conclusion of the trial, Mr. Neblett, who tried both cases in behalf of the Commissioner, made the following statements [R. 588-9 in No. 11,547]:

> "The Court: Now, what do you think they did when they exercised this option?
>
> Mr. Neblett: Well, we have taken two positions in it. We say in the Seattle case, your Honor, that they purchased the trade name, and it was a capital transaction. That was the position we took before Judge Mellot.

* * * * * * * *

The Court: Well, now what position do you take in this case?

Mr. Neblett: We take the position in this case that in view of the rights that were reserved that this did not constitute a sale or a capital transaction, it constituted a mere license. In other words, we take an opposite position from what we took in the Seattle case."

Briefs were subsequently filed, including an *amicus curiae* brief by the Seattle Company presenting its interpretation of the contract; and in the meantime, before the *Seattle* case had been decided, Judge Mellott resigned from The Tax Court and the *Seattle* case was transferred to Judge Harron, who, as we have just said, heard the *Rainier* case. Soon thereafter (on April 29, 1946) Judge Harron promulgated the opinion in the *Seattle* case, followed in less than two months by the opinion in the *Rainier* case. [R. 72 in No. 11,467; R. 78 in No. 11,547.] In these circumstances it was only natural that the second case would be decided on the authority of the first, without repeating all that had been said in the earlier lengthy opinion.

In the *Seattle* case the Commissioner argued that the transaction was a sale and not a license.* In his Opening Statement before The Tax Court in the *Seattle* case

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*We do not intend to infer that this was his only argument; but his other arguments were advanced for the first time at the trial, as alternatives and "irrespective of whether this was a sale of a capital asset." [R. 88-89 in No. 11,467.]

counsel for the Commissioner stated [R. 91 in No. 11,-467]:

> "And the five year period, the evidence will show, your Honor, was merely a trial period. The Rainier Brewing Company, or the Seattle Brewing Company, formerly the Century Brewing Company, did not want to assume the risk of ownership during that period, so they thought they would see how the royalties would function before they made up their minds to assume the risk of ownership. Therefore the five year clause in the contract."

In his brief filed with The Tax Court in the *Seattle* case the Commissioner made the following statements:

> "* * * The option provision * * * accorded petitioner the right to 'terminate all royalties thereafter payable' under the contract. This it did by execution of the notes aggregating $1,000,000.00. Neither that aggregate obligation nor the several installment notes constitute 'royalties,' because the exercise of the option definitely terminated all royalties; * * *
>
> * * * To say that petitioner acquired no 'title' under the contract is, in effect, to say that title may not be acquired to intangibles. Petitioner's contention that it acquired no 'equity' in the intangibles for its investment of $1,000,000.00 is so unreal and contrary to the evidentiary facts that extended discussion of the point would seem to be unnecessary. Does a binding contract for exclusive perpetual use of designated property rights which are recognized by

the law give an 'equity' in the property or rights? Obviously, the correct answer is in the affirmative. * * * Upon conversion of the contract to the fixed payment of $1,000,000.00 required under the option, *petitioner acquired more than the permissive use of such assets.* Clearly, it acquired 'title' to the contract not to compete and also title to the goodwill attaching to the various properties acquired from Rainier. * * *

* * * * * * * *

The Court in *Andrew Jergens Co. v. Woodbury* (D. Ct., D. Del., 1921), 273 Fed. 952, *aff'd.* 279 Fed. 1016, *cert. den.* 260 U. S. 728, held that where the owner of a trade-mark gave an exclusive license, with certain exceptions, but the transaction disclosed a purpose to transfer the rights therein, *it was not a mere license* but in legal contemplation constituted an assignment notwithstanding the use of the word 'license.' Respondent maintains here that similarly, the giving by Rainier of the exclusive perpetual rights under the subject contract to petitioner in the designated territory was tantamount to an *assignment of such rights.* In this connection, there would seem to be no question but that an owner of rights may transfer less than the total rights he owns. Surely one who has property rights such as trademarks and brands in use over a large territory, may effectively transfer and assign, as in this case, exclusive perpetual interests therein in designated localities. Technical considerations as to the effect on the title of the owner would seem to be unimport-

ant. The *rights* themselves *constitute property* along with the goodwill of which they are a part. See the *Coca Cola Bottling Company v. The Coca Cola Company* (D. C., Del., 1920), 269 Fed. 796. In that case it was also held that good will was salable property. The Court further held that a secret process or formula of the manufacture of an article is one in which a property right can exist, and that such rights can be sold in whole or in part.

It is unimportant that no bill of sale or documents of title were passed, as no formalities are required for the transfer of such properties. *Woodward v. White Satin Mills Corp.* (C. C. A. 8th, 1930), 42 F. (2d) 987, 989. The transfer may be, and often is, implied. *Canadian Club Beverage Co. v. Canadian Club Corp.* (Sup. Jud. Ct., Mass., 1929), 168 N. E. 106, 268 Mass. 566. * * *"

With arguments such as these, is it not odd for the Commissioner to assert now that The Tax Court did not clearly understand the effect of its decision when it construed the transaction to be a sale? And is it not odd for the Commissioner now to contend vigorously that the notes constituted advance or prepaid royalties, whereas below in the *Seattle* case he as vigorously insisted that they were not royalties of any character "because the exercise of the option definitely terminated all royalties?"

The Tax Court in the *Seattle* case adopted the position thus taken by the Commissioner, and instead of placing its decision upon any narrow and meaningless distinction

between a perpetual license and the beneficial ownership of a name, it squarely held that the perpetual license involved here was equivalent to a transfer of ownership in the name. This is made clear by the Court's own headnote [R. 36 in No. 11,467]:

> "* * * held, (1) the right to use the trade-name in connection with the manufacture and sale of alcoholic malt beverages is property which the owner thereof could license or assign to another; (2) the grant of an exclusive and permanent right in a limited territory was an assignment of such right; (3) the taxpayer acquired a capital asset and the transaction was a sale and not a lincense."

The Court's opinion (particularly from R. 60 to 71 in No. 11,467) clearly shows a determination that the transaction was a sale rather than a mere license. It stated on page 60 that the mere fact that a lump sum payment was involved was not "determinative *whether the transaction was a license or a sale,*" nor was the fact that the parties are called licensor or licensee [R. 64]; rather the nature of the transaction is controlling and we must look to the extent of the rights granted and the finality of the grant. The Court then reviewed the changes in the parties' relationship upon exercise of the option, stating [R. 61]:

> "* * * Thereafter there was no further payment to be made and the forfeiture clause became inoperative. The exclusive right to use the trade-name in the designated territory became perpetual and the

liability of having it revoked by the happening of a subsequent condition no longer existed in a real sense."

The Court continued by saying that the owner of a trade-name

"* * * may assign or transfer a property right thereto by grant in a limited territory. If such grant is exclusive and perpetual its characteristics more resemble a sale than a license, and this is particularly true where all the consideration has been paid. In Goldsmith v. Commissioner, *supra,* Judge L. Hand said 'It does not unduly strain the meaning of a sale to make it include an exclusive license.' * * *" [R. 62.]

The court continued [R. 63]:

"It is true under this agreement that petitioner could not assign the rights granted to it without the consent of Rainier, but we do not regard this provision as controlling here. Neither could Rainier assign the right to another or use it itself. The exclusive grant to petitioner resulted in the retention by Rainier of the naked legal title in the interest granted for the benefit of the grantee. Moreover, by the grant of an exclusive right and the agreement not to compete, Rainier transferred to petitioner its business in alcoholic malt beverages sold under the trade-name in the limited territory."

After quoting from *Parke, Davis & Co.*, 31 B. T. A. 427, that in "*a question of income tax liability* * * *

(the) legal title is of little consequence and the inquiry is as to the ownership of the beneficial interest." The Court concluded as follows [R. 66-67]:

> "* * * It, therefore, makes no difference what terminology is applied to the payment. Regardless of the language used, it was the intention of the parties that upon the payment of $1,000,000 the petitioner should have the exclusive and perpetual use of the trade-name 'Rainier,' regardless of the quantity of beer manufactured and for all future time. *These provisions, we think, are inconsistent with the theory of a lease or license and are more consistent with the idea of a sale.* * * * *All of these facts are consistent with the idea of a sale, but not consistent with the idea of a license.* We see no inhibition where a corporation owns a trade-name to its assigning a right to use that name in a designated territory for a price, and if the right to use is perpetual and exclusive *it is more consistent with the idea of a sale than a lease,* particularly where it is not dissociated from the business or merchandise with which it has been used. * * *" (Emphasis added.)

It will be seen from the foregoing that the Court in the *Seattle* case approached the question as much from the standpoint of the grantor (Rainer) as it did from that of the grantee (Seattle). We respectfully submit that the Commissioner is in error when he alleges that The Tax Court did not specifically hold in the *Seattle* case that there was a sale.

II.

The Tax Court Was Correct in Finding and Deciding That the Transaction Constituted a Sale Rather Than a License.

The Tax Court was thoroughly justified in determining that the contract under consideration, both factually and legally, was in reality a license of the name "Rainer" with an option to purchase at the end of five years.

The Commissioner asserts that a "sale" within the meaning of the Internal Revenue Code means a transaction "which qualifies legally as a 'sale' and is commonly understood to be encompassed by that word." (Br. 57.) We do not know what is meant by the words "qualifies legally," but we do agree that a sale for tax purposes is such a transaction as is commonly understood to be a sale. That appears to be the only criterion laid down by the Supreme Court. *Helvering v. Flaccus Leather Co.,* 313 U. S. 247; *Fairbanks v. United States,* 306 U. S. 436. In *Burnet v. Harmel,* 287 U. S. 103, the Court stressed the fact that an oil and gas lease is not commonly understood to be a sale of the natural resources in place. The practical aspect was emphasized also in *Hale v. Helvering,* App. D. C., 85 F. (2d) 819, cited by the Commissioner, where the decision turned largely upon the ground that neither business men nor lawyers refer to the compromise of a note as a sale to the maker.

There can be no question in the present case but that exercise of the option would be, and in fact was, commonly understood to constitute a sale of the name. Certainly the presidents of both companies so understood it, as did the citizens of Seattle who developed an interest in buying stock of the Seattle Company in reliance upon

the president's announcement in the financial section of the public press that new stock would be issued to finance the "outright purchase" of the name in Washington and Alaska. The transaction would be commonly understood to be a sale by anyone who read the report on either company by the reliable organization Dun and Bradstreet, Inc. Going back to the origin of the agreement, the parties provided that the Seattle plant would stand as security for the performance of *all* the obligations of Seattle under the contract, and at the same time they provided that the security would be released if Seattle should exercise the option and pay the million dollars. This certainly indicated the belief of both parties that such exercise and payment would bring to an end any possibility of a default on the part of Seattle that would justify liquidated damages or termination of the contract.

We submit that as a practical matter the grant of a perpetual license to use a trade name, which cannot be terminated, is equivalent to an assignment of the name. Particularly is this true where, in final analysis, there is no perceptible difference between a trade name as such and the right to use a trade name. This proposition is established by the cases cited on pages 46 and 47 of the Commissioner's brief, which we shall not repeat. The only office of a trade name is to protect the good will which it symbolizes; it cannot be transferred and does not exist separate and apart from a business. Hence, what does the owner have left in the trade name when he has disposed of the business and, for a lump sum of $1,000,000.00, granted the vendee the sole, exclusive, and perpetual license to use the name? Surely there can be no reversion after a perpetuity.

The classic definition of a royalty is a periodic payment to the owner for the use of his property and in proportion to the use made thereof. If, in substance, an owner has only a perpetual right to use a name, what elements of ownership to sustain a royalty are left after he has conveyed to another that perpetual user? To say that he is none the less possessed of a legal title is to make taxes turn upon technicalities of form. The income-producing properties of the asset are gone, which alone gave economic value to it. That is the substance of the matter. In their place are $1,000,000.00. Taxwise, the owner will recover its cost of that asset out of the $1,000,000.00, or not at all.

A persuasive analogy to our unique situation here is the line of authority in the tax field growing out of the grant of easements with respect to real property. Much the same type of a situation is there involved: the land owner retains record title to the land, just as Rainer purported to retain title to the registrations here; neither type of property is subject to depreciation, so the owner cannot look to annual deductions for a recovery of his capital; and the granting of an easement contains the principal factor of perpetual use which is of prime importance here. In *H. L. Scales,* 10 B. T. A. 1024, the petitioner granted to a levee improvement district a perpetual easement and right-of-way for flood control purposes over 324.4 acres of his 6,000 acres of land. The Commissioner determined that the consideration received for the easement was taxable as ordinary income; but the

Board held, on the contrary, that petitioner was entitled to deduct as a capital loss the difference between his cost of the 324.4 acres and the amount received. The Board said:

> "Under the provisions of this instrument it is plain that about the only thing or interest remaining in the petitioner is the bare legal title and that this is of no practical or market value. * * *"

The Board then quoted from many authorities and concluded:

> "In view of these authorities and the facts that the petitioner has surrendered perpetual and complete control of the 324.4 acres involved hereinto the Levee Improvement District, and that it is useless for purposes of cultivation or grazing because almost always overflowed by water, we must hold, for the purposes of this proceeding and for taxation, that the conveyance to the Levee Improvement District was tantamount to a sale and that petitioner has no beneficial interest therein. * * *"

The Bureau of Internal Revenue acquiesced in this decision, C. B. VII-2, 35, and apparently has recognized its justice, for even where some beneficial use of the land has remained in the owner, the Bureau holds that the amount received from the grant of an easement should be applied against and reduce the basis of the land. See G. C. M. 23162, C. B. 1942-1, 106.

Not only as a practical matter has the owner of a trade name sold his interests therein when for a lump sum he has granted a perpetual right to its use, but the courts have generally held that a perpetual license, in

legal contemplation, amounts to a sale or disposition of the property interests in the name.

In *Griggs, Cooper & Co. v. Erie Preserving Co.,* 131 Fed. 359, the agreement granted "the absolute and exclusive use" of a trade-mark *"in and to the several states of Minnesota, Wisconsin, North Dakota, South Dakota and Montana, * * * during such time only as they* [the licensees] *and their successors shall continue in business,"* with certain reservations in favor of the grantor. It was held that this agreement effected a transfer of the trade-mark notwithstanding the geographical limitation, the reservation of rights in the assignor, and the limitation of business by the assignee or its successors. The Court said:

> "* * * The specific language employed is open to the reasonable construction that the intention of the assignor was to convey to Griggs, Cooper & Co., complainant, an absolute and exclusive ownership of the trade-mark 'Home Brand,' and the right to use the same in the sale of its vendible commodity in the localities mentioned in the assignment. The reservation to the transferor does not limit or qualify the alienation of the prior adopted mark to complainant and its successors in their business. * * * The argument of the defendant proceeds upon the theory that Fry & Co., because of the limitations expressed in the assignment, did not convey an exclusive right to appropriate the distinctive mark by which its vendible goods were identified, and that the effect of the writing was to create a mere license which did not convey the good will or business of the transferor, and therefore complainant has no such exclusive right to the use of the words 'Home Brand' or the word 'Home' as would permit recourse on the

part of complainant to a Court of Equity for a violation of trade-mark rights. This proposition is thought unsound. The written agreement unquestionably carried with it a valuable concession which inured to the business advantage of the complainant corporation. On the other hand, the assignor parted with the exclusive ownership and good will in its arbitrarily selected trade-mark 'Home Brand' within the territory specified in the assignment, merely reserving to itself, as we have seen, certain permissive rights in its personal use. The primary acquisition by Fry & Co. of the mark adopted to indicate its manufacture of the articles to which the same was appropriated was undeniably transferable * * * and such assignment is sufficient to entitle complainant to the protection afforded to owners of trade-marks in like cases. * * *"

In *Andrew Jergens Co. v. Woodbury, Inc.*, 273 Fed. 952 (District Court of the District of Delaware), the Woodbury Institute, in consideration of stock of the Woodbury Company, executed a contract in 1905 whereby the Institute—

> "* * * shall and hereby does give and grant to the company the exclusive license to use the aforesaid neckless head trade-mark, * * * except in so far as conflicting rights have heretofore been given or granted to other persons or corporations, reserving to itself, however, the right to use the same so long as it shall continue in active business, but not otherwise; * * * and further agrees with the company that, if at any time the Institute shall cease to engage in active business, the right of the Institute to use said lists of patients and said mailing lists shall cease, and the same shall become the exclusive property of the company."

It was contended that the Woodbury Company had acquired no title, but a mere license, under the contract of 1905, but the Court held:

> "The complainant further urges that, if the contract was not void, it constituted but a mere license, personal to the Woodbury Company, to use the mark. I cannot agree with this contention, for I think the agreement discloses a purpose to transfer, and that it did transfer to the Woodbury Company, all rights in the trade-mark, subject only to the two exceptions, and that, although using the word 'license,' it was, in legal contemplation, an assignment. Sirocco Engineering Co. v. Monarch Ventilator Co. (C. C.), 184 Fed. 84; Griggs, Cooper & Co. v. Erie Preserving Co. (C. C.), 131 Fed. 359."

In *Coca-Cola Bottling Co. v. Coca-Cola Co., 269* Fed. *796* (1920) (District Court, District of Delaware), the Coca-Cola Co. had adopted the trademark "Coca-Cola" in its business of manufacturing and selling syrup which was used only as a base for drink served at soda fountains. In 1899 it executed a contract looking to the establishment of a bottling business, which contract provided as follows:

> "Said party of the second part further agrees and hereby grants to said parties of the first part, the sole and exclusive right to use the name Coca-Cola and all the trade-marks and designs for labels now owned and controlled by said party of the second part, upon any bottles or other receptacles containing the mixture heretofore described, and the right to vend such preparation or mixture bottled or put up as aforesaid, in all the territory contained in the boundaries of the United States of America, except

the six New England states and the states of Mississippi and Texas. This right to use the name Coca-Cola and the trade-mark and label furnished is to be applied only to the carbonated mixture described, and is not intended to interfere in any way with the business and use of the same as now operated by the party of the second part, nor to apply to the soda fountain business as now operated by various parties. The rights of the parties of the first part under this contract may be by them transferred to a company, the formation of which is now contemplated by them to be known as the Coca-Cola Bottling Company, *but no transfer of their rights under this contract to any other party or parties, shall be made without the consent of the party of the second part.*" (Emphasis added.)

It will be seen that this contract embodied three factors analogous to the present case: (1) geographical limitation; (2) the assignee could not assign without the assignor's consent; and (3) the transfer covered only bottled drinks, reserving the name as applied to the syrup. Nevertheless the Court held that there had been a conveyance of good will and property interests in the name. It stated:

"* * * The Georgia corporation * * * granted and conveyed to the bottlers 'the right to use the trade-mark name Coca-Cola, and all labels and designs pertaining thereto, in connection with the product bottled Coca-Cola' in the prescribed territory. The extent of the good will, symbolized by the trade-mark, so transferred, is disclosed by the grant of the 'sole and exclusive' right thus to use the name and trade-mark, or, as expressed in the amend-

ment, by the negative covenants of the Georgia corporation that it will 'only manufacture syrup for bottling purposes in sufficient quantities to meet the requirements' of complainant and others holding similar rights * * *. The good will so transferred was, as to the bottling business, perpetual and exclusive.

The transfer of the interest in the trade-mark was not a transfer in gross. The right to transfer the good will and trade-mark under such circumstances is shown by the authorities hereinbefore referred to. As I see it, it is immaterial whether the interest in the trade-mark acquired by the bottlers was a legal title or merely a beneficial interest. * * * Consequently the ultimate question touching the trade-mark would thus seem to be, not whether the trade-mark could be assigned, but merely the extent of the interest assigned. *If a limited interest therein by way of license could have been assigned, no reason appears why, under the circumstances, an unlimited interest could not likewise have been assigned*"

* * * * * * * *

In *Canadian Club Beverage Co. v. Canadian Club Corp.*, 168 N. E. 106 (Supreme Judicial Court, Mass., 1929), the former owner of the "Canadian Club" trade-mark, William Ireland, Inc., by a written instrument executed in 1922, sold to plaintiff its bottling plant,

"* * * 'together with all labels used in connection with the bottling and tonic business conducted

by said William Ireland, Incorporated, and together with the right to use the "same Canadian Club" for all purposes except in connection with the manufacture of syrups.' "

In 1923 Ireland was declared a bankrupt and all its business was sold to defendant's predecessors, who thereafter attempted to revoke plaintiff's license to use the name Canadian Club. The Court held that the name passed with the sale of the bottling business, saying:

> "* * * The conclusion is warranted that the name was used under a claim of right, *and that the property in the trade name was sold to the plaintiff in February, 1922.* (Emphasis added.)
>
> * * * * * * * *
>
> * * * If the word 'same' preceding the words 'Canadian Club' is an error for the word 'name,' then the right to use the trade name 'Canadian Club' was expressly granted to the plaintiff and Ireland had authority under the vote of the directors to make this assignment. If there was no mistake in using the word 'same,' the name would pass as an asset of the Ireland company and a part of its bottling equipment."

From these authorities we submit that in legal contemplation a grant of the perpetual right to use a name is tantamount to an assignment of the property in the trade name.

III.

Reply to the Commissioner's Argument on Brief.

A. In Part A of his brief (pages 25-30) the Commissioner compares the million dollar payment in this case to the cash bonus received upon the execution of many oil and gas leases.

This comparison overlooks the three reasons why a cash bonus in an oil lease is taxed as ordinary income. The first is that it is treated as ordinary income *only* where the assignor has reserved an economic interest in the oil property, such as a royalty dependant upon production of oil. In other words, the term *advance* royalty presupposes that a regular royalty will follow; otherwise the word "advance" is meaningless. If no such economic interest in the oil property is retained by the assignor, the transaction is treated as a sale and the cash bonus is taxed as proceeds of sale. *Helvering v. Elbe Oil Land Development Co.,* 303 U. S. 372, 82 L. Ed. 904. In the second place an assignor who has retained an economic interest need not look to the sale or exchange provisions of the Code to recover his capital investment tax free; he stands to recover his entire capital—not only representing the interest he has allegedly sold but his retained interest as well—by way of statutory depletion allowances that are deductible not only from future recoveries but from the cash bonus itself. The compelling necessity of recovering capital from a single lump-sum consideration, or not at all, is thus not present where an economic interest is retained. And conversely, if the assignor will derive no future benefit from a retained interest, the transaction *is* treated as a sale and immediate recoupment of capital is available to him as on a sale. The third reason was

stated by the Supreme Court in *Burnet v. Hormel,* 287 U. S. 103—a lease of oil property, with retention of a royalty interest, is not commonly understood to be a sale of the oil in place.

In the present case the taxpayer had an unadjusted basis of half a million dollars in the trade name "Rainier" as used in the sale of beer in Washington and Alaska. It conveyed the entire beneficial interest in that asset to Seattle for one million dollars. It has retained no economic interest whatever in that asset in those areas. To characterize the payment as an "advance" royalty is at odds with the facts. Rainier must recover its basis of the asset out of this payment or not at all. It could not do so from the proceeds of sale of any subsequent transfer of its business, for the purchaser could acquire no rights to the name in Washington and Alaska (since Rainier carries on no business in those areas it could not assign to a subsequent purchaser any business, good will or interest in a trade name in those localities). Finally, as we have seen, the transaction here was commonly understood to be a sale.

B. In this part of his brief (pages 30-37) the Commissioner argues that the *Dobson* rule does not preclude this Court from determining that there was no sale. The first ground is that The Tax Count's finding of a sale is not persuasive because of its failure to understand the effect of the decision in the *Seattle* case. We have answered this contention in Part I of this brief, *supra.* The Commissioner also asserts that in any event "there is no factual basis for The Tax Court's decision." We believe that the factual basis, resting upon uncontradicted evidence as to the intent and common understanding of

the parties, not only adequately supported the Court's finding but practically compelled it to reach the conclusion it did. This matter has also been fully discussed hereinbefore.

The final reason advanced for not applying the *Dobson* rule is that whether a sale occurred or not is a clear-cut question of law. The Commissioner asserts (Br. 35-6):

> "The *Dobson* case itself is authority for the proposition that only a question of law is presented when the question is whether the undisputed facts establish a 'sale of a capital asset' within the meaning of Section 117 * * *."

The Commissioner then quotes nearly the entire opinion of the Supreme Court in denying the petition for rehearing. *Dobson v. Commissioner,* 321 U. S. 231, 88 L. Ed. 691.

Our interpretation of this opinion is exactly the opposite from what the Commissioner finds in it. The taxpayer in that case admittedly had realized income, but claimed it should be taxed as capital gain, as opposed to the Commissioner's treatment of the item as ordinary income. There was absolutely no dispute as to the facts, for they had all been stipulated. *John v. Dobson,* 46 B. T. A. 770. The Board of Tax Appeals disposed of the issue on page 774 as follows:

> "* * * Petitioner's contention that the income so realized should be taxed as capital gain is denied on authority of *Avery R. Schiller,* 43 B. T. A. 594."

The cited case involved similar facts, where the Board had said, "we do not think that the facts in the instant case show that petitioner made a sale of the stock * * *."

Hence, the Board's implied, if not expressed, holding in the *Dobson* case was that capital gain was not involved because the transaction did not constitute a sale. In his petition for rehearing before the Supreme Court the taxpayer argued that the issue below presented questions of law. If the Supreme Court had agreed with that view it certainly would have been necessary to decide whether the transaction, as a matter of law, did or did not constitute a sale. But it did not do that; it merely pointed to the absence of a finding by the Board that a sale occurred (which was tantamount to a finding of fact that the transaction did not constitute a sale, particularly in the light of its reliance on the *Schiller* case) and held that it could not decide as a matter of law that the transaction was a sale or exchange "in the accepted meaning of those terms."

Upon the authority of that case how can it be argued that this Court is in a better position to declare a transaction not to have been a sale as a matter of law where The Tax Court has made an explicit finding of fact that it was? The *Dobson* case, we submit, is to the contrary.

The Tax Court in the present case found as a fact that exercise of the option effected a sale. There was ample evidence to support the finding, for both parties expressly characterized the transaction as a sale and the public so understood it. The *Dobson* case establishes the principle that findings are conclusive if supported by any substantial evidence; and hence the finding in this case is not reviewable by this Court. Although the Commissioner alleges generally that there is no factual basis for The Tax Court's decision (Br. 37), his brief does not even attempt to support the assertion. He admits that there was "some evidence that Seattle's option was regarded

as a right to purchase." (Br. 55.) There not only was "some" evidence, but it was direct, positive and uncontradicted. The Commissioner presented no evidence whatever to the contrary.

The Supreme Court has applied the *Dobson* doctrine in affirming The Tax Court's conclusion as to whether a transaction was or was not a sale. In *Choate v. Commissioner,* 324 U. S. 1, the owners of an oil and gas lease assigned the lease, together with all the equipment thereon, to another party for $110,000.00 cash plus a royalty of one-eighth of all the production therefrom. The Board of Tax Appeals held, in line with many Supreme Court decisions, that the reservation of an economic interest in the oil, through retention of a royalty, reduced the transaction to a sublease insofar as the lease itself was concerned, notwithstanding the agreement designated the parties as "buyers" and "sellers." In other words, the cost of the lease would be recoverable through depletion allowances, including depletion on the cash bonus or advance royalty, rather than recouping the entire cost out of the cash bonus as upon a sale.

The important point here is that the Board further held that the same transaction effected a sale of the equipment on the lease and that the portion of the $110,000.00 attributable to the equipment should be treated as proceeds of sale and reduced by the entire cost basis of the equipment. The Board reasoned, how else could the taxpayer recover the cost of its equipment—bearing in mind that depletion, which would return tax-free the capital invested in the oil itself, could never be claimed with respect to the physical equipment. For the practical purposes of taxation the only reasonable way to recover

the cost of the equipment was to treat the transaction as a sale to that extent.

Incidentally, it should be observed that this case is ample authority for the point we made above, that cases dealing with the retention of economic interests in oil and gas properties represent a unique type of case, for the practical reason that the assignor stands to recover his entire capital investment—with respect to the interest allegedly sold as well as his retained interest—by way of depletion deductions; whereas with other types of property unless a taxpayer can recover his cost out of a lump sum payment, constituting all he will ever receive, he will completely lose his capital for tax purposes forever. It was for this compelling reason that the very same agreement in the *Choate* case was held to result in a sale of equipment while at the same time it was held not to result in a sale of the gas and oil lease.

The Commissioner appealed the conclusion of the Board with respect to the physical equipment to two Circuits. The Fifth Circuit affirmed the Board, *Hogan v. Commissioner,* 141 F. (2d) 92; the Tenth Circuit reversed, with one Judge dissenting, *Choate v. Commissioner,* 141 F. (2d) 641, saying at page 642:

> "In the case at bar the instruments clearly on their face reflect that the transaction was one in entirety covering both the oil reserves and the equipment and that consequently the depletion method must be applied to the entire consideration * * *."

The Supreme Court granted certiorari to resolve this conflict. It pointed out that "The Commissioner makes an elaborate argument based on the assumption that there was no sale of the equipment." It then stated that there

were two difficulties with his argument, the first being that there is no provision in the Code or regulations for depletion of equipment, and—

> "* * * In the second place, The Tax Court found that the parties intended a cash sale of the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the kind of issue reserved for The Tax Court under Dobson v. Commissioner, 320 U. S. 489, and Wilmington Co. v. Helvering, 316 U. S. 164, 167-168. Once a sale of the equipment is conceded, it is not denied that petitioner is entitled to an allowance for the unrecovered cost of the equipment transferred * * *."

The Commissioner (Br. 34) attempts to distinguish that case by stating that in the present case there is "no factual question here as to the intent of the parties (as in *Choate v. Commissioner,* 324 U. S. 1) * * *." The truth of the matter is that there was no factual question as to the intent of the parties in the *Choate* case—no conflict of evidence. The only finding in that case going to the matter of intent was that "Neither the Choates nor Hogan understood that they had any rights as landlord." Certainly this finding should be no more binding upon an appellate court than the following finding* in the Seattle case [R. 70-1 in No. 11,467):

> "* * * it was obviously the intention of the parties that Rainier grant to petitioner all of the right which

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*See *American Box Shook Exp. Ass'n. v. Commissioner,* C. C. A. 9, 156 F. (2d) 629, 631, where this Court cited its previous decisions to the effect that "we may read the findings of the Tax Court together with its opinion to ascertain what the Tax Court found as facts."

it had to use the trade-names 'Rainier' and 'Tacoma' in the manufacture and sale of alcoholic malt beverages in the State of Washington and the Territory of Alaska. It was also the intention of the parties that this grant was to be exclusive not only as to third parties but as to Rainier itself. We know of no reason why one who is the owner of the right to use a trade-name may not grant to another its exclusive use in a limited territory for all future time upon the payment of a price. * * * Such a grant, while not disposing of the entire property in the grantor, is the equivalent of such disposition within the limited territory granted. * * *"

Also dealing with the intention [R. 66]:

> "* * * Regardless of the language used, it was the intention of the parties that upon the payment of $1,000,000.00 the petitioner should have the exclusive and perpetual use of the trade-name 'Rainier,' regardless of the quantity of beer manufactured and for all future time. These provisions, we think, are inconsistent with the theory of a lease or license and are more consistent with the idea of a sale. * * *"

In view of the foregoing it is respectfully submitted that The Tax Court's findings and conclusions in this case are correct, and in any event the *Dobson* rule precludes reversal here.

C. On pages 37 to 45 of his brief the Commissioner asserts that Seattle acquired only a limited right to use the trade name. The limitations stressed by the Commissioner are that (1) the contract covered only Washington and Alaska, (2) it applied only to beer, ale and other alcoholic malt beverages, (3) Seattle could not assign without

Rainier's conset, and (4) Rainier agreed to maintain the registrations.

We have seen above that trade names exist only in connection with a business; and since businesses can be split up and sold in geographical units the same is true of goodwill and trade names. This necessarily follows from such cases as *United Drug Co. v. Rectanus Co.,* 248 U. S. 90, 63 L. Ed. 141, where it was held that the owner of the trade-mark "Rex," which had been used only in the New England States in the sale of certain medicine, could not thereafter enjoin the defendant from using the same mark in the sale of similar medicine in Kentucky, when the adoption and use of the name by the latter was without knowledge of the former's rights in the other location. The necessary result of such a decision is that each owns the name in his own territory. To the same effect is *Hanover Star Milling Co. v. Metcalf,* 240 U. S. 403, 63 L. Ed. 713; and in *Esso, Inc., v. Standard Oil Co.* (C. C. A. 8, 1938), 98 F. (2d) 1, 7, it was held that two companies, each a former subsidiary of Standard Oil Company of New Jersey, were entitled to the exclusive use in their respective territories of the same trade marks.

If by adoption and use the same name on the same type of product can thus be owned by two different individuals, operating in different markets, what reason could there possibly be for holding that if one merchant owns a trade-name in an extensive area he cannot convey to another a part of his business, including the goodwill and name, in a portion of that area? We submit that there is none, and have been unable to find any authority to support such a curious result.

On his second point, that Rainier reserved the right to use the name in the sale of nonalcoholic beverages, the Commissioner is foreclosed by the case of *American Crayon Co. v. Prang Co.* (C. C. A. 3, 1930), 38 F. (2d) 448, vacating 28 F. (2d) 515, where the Prang-Maine Company, selling 70 or 80 articles under the name "Prang," sold to the American Company its right, title and interest in and to the trade-name "Prang" as applied to six specific products, viz., crayons, pastels, oil and water color paints, pencils, erasers and pens. In a suit by the American Company against Prang-Maine for infringement, the Court held that its rights had been infringed, saying:

> "* * * we are of opinion that so far as the specified articles * * * are concerned, the Prang-Maine gave up everything of a Prang name, character or mark to the American. * * *" (At p. 449.)

In the course of its opinion the Court refers specifically to the "sale to American" and to the fact that paste "was not included in the sale."

Similarly, our case is the same in this aspect as *Coca-Cola Bottling Co. v. Coca-Cola Co., supra,* and *Canadian Club Beverage Co. v. Canadian Club Corp.* (S. C. Mass., 1929), 168 N. E. 106, in each of which a transfer was made of a trade name for use only in connection with bottled drinks, the vendor in each instance expressly reserving the use of the name in the sale of syrups. Notwithstanding this limitation the Court in the latter case declared that "the property in the trade name was sold" insofar as it related to the bottling business. *A fortiori,* we submit, it was competent as a matter of law for Rainier to sell its name as applied to alcoholic malt beverages, retaining the right for what it might be worth

at some indefinite time in the future to use it on nonalcoholic beverages. This reservation causes no difficulty insofar as the basis is concerned, for at March 1, 1913, the predecessor was not manufacturing nonalcoholic beverages and never had. Hence, all the value—and therefore the basis—attached to the use of the name upon the sale of beer.

Insofar as the provision against assignment by Seattle without Rainier's consent is concerned, this case is no different from *Coca-Cola Bottling Co. v. Coca-Cola Co.,* 269 Fed. 796 (D. C., Del.), discussed above. It is also similar to *Parke, Davis & Co.,* 31 B. T. A. 427, which was relied upon by The Tax Court [R. 63-64 in No. 11,467]. The taxpayer in that case granted a license for a lump sum, the "licensee" agreeing not to assign without consent of the "licensor." The taxpayer contended that the consideration was a return of capital, inasmuch as a one-half interest in the patents had been transferred by the contract. The Commissioner contended as here that the sum was ordinary income, predicated upon substantially the same grounds as he urges here, including the fact that the licensee "did not receive the right to grant to others, by way of license, the right it received from petitioner."

The Board of Tax Appeals held that the transaction constituted a sale. In an opinion reviewed by the full Board it stated:

> "* * * It is true that a right to sell the invention or to grant to others a license was not transferred to Lilly, but petitioner by the agreement surrendered the right to exercise these privileges without Lilly's consent, so that its rights in this respect were no greater than those of the latter. * * *"

The board then emphasized the accepted principle that bare legal title is not of supreme importance in tax litigation. It declared:

> "* * * The right to maintain a suit at law is often controlled by the question of the possession of the naked legal title. Here we have a question of income tax liability where legal title is of little consequence and the inquiry is as to the ownership of the beneficial interest. We are not to determine whether petitioner or Eli Lilly & Co. could maintain a suit for infringement in its own name, but merely whether petitioner, under its contract with Eli Lilly & Co., divested itself irrevocably of certain capital investments in consideration of the payment made to it by the latter company. If this is the fact, then the transaction for income tax purposes is no more than a conversion of capital."

Similarly here, Rainier now cannot transfer or assign any interest in the name in Washington and Alaska, since it now carries on no business there.

The foregoing also answers the point about Rainier's maintaining the registrations. Naked legal title is of no significance in the practical field of taxation. Furthermore, it is well settled that registrations are purely procedural in nature and do not alter or impair substantive common law rights as regards the ownership of trade names. See *United Drug Co. v. Rectanus Co.,* 248 U. S. 90, 98, 63 L. Ed. 141, 146; *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.,* 305 U. S. 315, 333, 83 L. Ed. 195, 206; *Est. of P. D. Beckwith v. Comm. of Patents,* 252 U. S. 538, 543, 64 L. Ed. 705, 707; *Pennsylvania Petroleum Co. v. Pennzoil Co.,* C. C. P. A., 80 F. (2d) 67;

Motlow v. Oldetyme Distillers, Inc., C. C. P. A., 88 F. (2d) 732, and *Ph. Schneider Brewing Co. v. Century Distilling Co.,* C. C. P. A., 107 F. (2d) 699, 703.

D. This section of the Commissioner's brief (pages 46-51) establishes the admitted proposition that a trade name cannot be assigned in gross, dissociated from the business to which it is appurtenant. But clearly there is no merit in his application of that principal to the facts of this case; that Rainier sold its business only in Alaska and Washington and had not manufactured its products in those areas do not militate against the plain fact that the business it had carried on in Washington and Alaska was conveyed to Seattle. So far as we are advised there is no requirement that the business must be that of manufacturing to permit a valid assignment of a trade name. And the sale of a business limited to certain states is a common occurrence, sanctioned by many of the cases heretofore cited.

Yost v. Commissioner, 9 Cir., 155 F. (2d) 121, cited by the Commissioner, is not in point here, because a stockholder obviously has sold nothing when he receives a consideration merely for voting his stock in a certain manner (to permit sale of the corporate assets and the execution of a covenant by the corporation not to compete with the purchaser). The corporation in that case, however, had clearly made a sale; and all that is claimed here is that Rainier, not its stockholders, made a sale. The Court stated in the *Yost* case that the stock which the holder continued to own had a substantial value and there was a very practical reason for not liquidating the stock, *i. e.,* contemplated resumption of business by the corporation.

Hale v. Helvering, App. D. C., 85 F. (2d) 819, held that the maker of a note does not sell anything when he pays the note in full or partially in compromise; and certainly it would be strange to regard such a payment of a debt as a sale by the debtor. The Court said that insofar as the debtor was concerned the property in the note was merely extinguished. The Commissioner presents a curious analogy by alleging that the property of Rainier represented by the name "Rainier" was partially extinguished when the option was exercised. We cannot see how it was extinguished, for the Seattle Company has it and has used it ever since. The name in Washington and Alaska did not cease to exist as property as does a note in the hands of its maker.

E. In this phase of his brief (pp. 51-61) the Commissioner attempts to distinguish the trade-mark cases relied upon by The Tax Court, which we have presented in considerable detail in Part II of this brief, *supra*. The Commissioner asserts that the Court in *Griggs, Cooper & Co. v. Erie Preserving Co.*, W. D. N. Y., 131 Fed. 359, "did not state that there had been a sale of the trade-marks." We quote from the Court's opinion:

> "* * * The specific language employed is open to the reasonable construction that the intention of the assignor was to convey to Griggs, Cooper & Co., complainant, an absolute and exclusive ownership of the trade-mark 'Home Brand,' and the right to use the same in the sale of its vendible commodity in the localities mentioned in the assignment. * * *"

The Commissioner states that the only real question in *Coca-Cola Bottling Co. v. Coca-Cola Co.*, D. C. Del., 269 Fed. 796, was whether the contract was terminable at will;

but the *reason* for the Court's negative answer to that question was because of its determination that the contract had effected a transfer of good will and the trade name for use on bottled drinks—a transfer that was "unlimited," to use the Court's own term, perpetual and exclusive in the territory covered by the agreement.

The Commissioner recognizes that title had passed in *Andrew Jergens Co. v. Woodbury, Inc.,* D. C. Del., 273 Fed. 952, aff'd 3 Cir., 279 Fed. 1016, certiorari denied, 260 U. S. 728, subject, however, to divestment "by the happening of a condition subsequent—the discontinuance of active business by the assignee." The significant point here is that this condition subsequent plainly prohibited the assignee from transferring its rights; yet this prohibition was not deemed to preclude the conclusion that there had been a transfer of the property in the name.

We respectfully submit that the cases cited by The Tax Court fully support its decision.

The Commissioner alleges generally that decisions involving copyrights are also pertinent and he cites several of them on page 60. Such an argument loses sight of the fundamental difference between a copyright and a trade name and of the reasons which led the courts to hold as they have with reference to copyrights. As the Supreme Court stated in *Delaware and Hudson Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581, 583:

> "* * * Property in a trademark, or rather in the use of a trademark or a name, has very little analogy to that which exists in copyrights or in patents for inventions. * * *"

While the right in a trade-name consists only of its user, the Board of Tax Appeals stated in *E. Phillips Oppenheim,* 31 B. T. A. 563, 565:

> "* * * A copyright—'the exclusive privilege of printing * * * publishing and vending copies of a literary * * * production'—embraces a number of privileges the use of which may be separately licensed in order to realize the fullest value of the work. * * *"

See I. T. 2735, XII-2 C. B. 131, 134, where it was stated:

> "In 'An Outline of Copyright Law' by Richard C. De Wolf (pages 77-78) it is stated:
>
> Through a series of licenses the various rights included in a single copyright may be parceled out among a number of different licensees, and this is a means of realizing the fullest value of a copyrighted work. In the case of a book, for example, the following series of rights may be the subject of separate disposition by license: Rights of first, and of second, serial publication; book publication; translation; dramatization, and the making of moving pictures. * * *
>
> In 13 *Corpus Juris* (1094-1095) it is stated that a copyright is an indivisible thing and can not be split up and partially assigned, either as to time, place, or particular rights or privileges, less than the sum of all the rights comprehended in the copyright; that exclusive rights may, however, be granted, limited as to time, place, or extent of privileges which the grantee may enjoy; and that the better view is that such limited grants operate merely as licenses and not as technical assignments, although often spoken of as as-

signments. (*New Fiction Publishing Co. v. Star Co.,* 220 Fed. 994; *Goldwyn Pictures Corporation v. Howell Sales Co.,* 282 Fed. 9.)"

This principle has no proper application here, for there are no such separate and distinct rights connected with a trade name. The only right is that of its use in connection with the business to which it is appurtenant. By granting an exclusive license to use a trade name in a given locality the grantor has not split up his interests except geographically, which is treated as an assignment in trade name cases. In the licensed territory he has disposed of all the rights the trade name afforded him.

Hence, the cases dealing with copyrights are based upon the substantive rule of copyright law that a license to use one of the separable rights in a copyright does not constitute a sale or assignment of the copyright itself; whereas, the cases heretofore noted treat an exclusive license to use a trade name in a given territory as a sale of the property in the name. And even in the copyright field the old theory is beginning to break down, for, as the Commissioner recognizes (Br. 69-70), Judges Learned Hand and Swan expressed the opinion that "It does not unduly strain the meaning of 'sale' to make it include an exclusive license."

> *Goldsmith v. Commissioner,* 2 Cir., 143 F. (2d) 466 (certiorari denied, 323 U. S. 774).

F. The last section of the Commissioner's brief on this issue (pages 62-70) is devoted primarily to a discussion of patent cases.

The Tax Court cited a few patent cases as illustrations of the point that a sale of property may be deemed to have taken place for tax purposes notwithstanding the presence

of restrictions against alienation or conditions subsequent which might operate to defeat the transaction. Since the Commissioner apparently does not seriously dispute The Tax Court's holding that the agreement is no longer forfeitable by reason of the occurrence of a condition subsequent, we regard this question as of no importance here. (Br. 41.)

The Commissioner, however, goes into detail with respect to the various types of transfers of interests under a patent for the purpose of showing that the present transfer of trade name rights would not qualify as a sale if tested by such patent criteria.

The difficulty with this argument is that patent law is a statutory subject and the types of transfers that may be made, and their effect, are matters strictly governed by the statute. This is shown by the quotation from *Waterman v. Mackenzie,* 138 U. S. 252, 255, on page 63 of the Commissioner's brief. Furthermore, in that field the words "make, use and vend" have practically acquired the status of words of art, and certainly find no counterpart in the law of trade-marks and trade names.

There is no comparable legislation governing the effect of assignments of trade names. The Trade-Mark Acts passed by Congress do not alter substantive rights in or to trade-marks, but simply provide procedural remedies to protect rights otherwise acquired. See the cases cited in Part III-C of this brief, *supra,* dealing with registration of trade names. A typical statement of the law in this

respect is found in *Ph. Schneider Brewing Co. v. Century Distilling Co.,* 10 Cir., 107 F. (2d) 699, 703:

> "The United States statutes, * * * providing for the registration of trade-marks and the assignment of registered trade-marks neither confer nor limit substantive rights. They merely confer certain procedural advantages to the registrant. The substantive rights are determined wholly by common-law principles. Registration does not create a trade-mark; neither is it essential to its validity. * * *"

Hence, it is respectfully submitted that tests, established in the strict statutory field dealing with patents, may not be adapted to the informal, common-law field of trade names. The significance of the patent cases cited by The Tax Court lies in the fact that with all the restrictions and limitations upon assignments in that field, The Tax Court can still enunciate a wholesome, practical decision for taxation, such as *Parke, Davis & Co.,* 31 B. T. A. 427. In that case, notwithstanding the use of the words "Licensor" and "Licensee," notwithstanding the prohibition against assignment by the "Licensee," and notwithstanding the express retention of the legal title in the "Licensor," the Court concluded that the nature of the grant was a transfer of beneficial ownership with retention of bare legal title solely for the benefit of another. The transaction was taxed as a sale.

In view of all the foregoing we respectfully submit that The Tax Court's findings and decision on this issue should be affirmed.

Second Issue.

On the second issue there is no dispute between the parties over the pertinent legal principles. Rainier recognizes that the basis of property must be reduced under Section 113(b)(1)(B) by the amount of "exhaustion, wear and tear, obsolescence, amortization, and depletion, *to the extent allowed (but not less than the amount allowable)* * * *."

The Supreme Court held that obsolescence of good will was not allowable as a result of the adoption of national prohibition on January 16, 1920. *Clarke v. Haberle Crystal Springs Brewing Company,* 280 U. S. 384, 74 L. Ed. 498. Hence, the sole issue here is over the amount of obsolescence that was erroneously allowed to Rainier. The evidence bearing upon this issue was submitted in the form of a stipulation consisting of five short paragraphs [see Stipulation III, R. 117-118], to which was attached as Exhibit 1 a claim for abatement of taxes for the year 1919. [R. 119-120.] The claim had attached to it Schedules A to F, inclusive [R. 121-127], the significant schedules for present purposes being Schedules E and F, appearing on pages 126 and 127 of the printed record.

It would appear that the Commissioner has *assumed* the two vital facts on this issue. Thus, in his statement of the question (Br. 2), statements of points to be used (Br. 21), summary of argument (Br. 24), and argument on this point (Br. 71-76), the Commissioner *assumes* that Rainier claimed a deduction for obsolescence for the year 1919 *in the sum of $542,240.27* and that the Commissioner *allowed* obsolescence in the sum of $406,680.20.

Neither assumption is supported by the facts in the record, by The Tax Court's findings [R. 60], or by the

Commissioner's statement of the case with respect to this issue. (Br. 19-20.) Indeed, in two sections of his brief (Br. 24, 73) the Commissioner uses the phrase—Rainier *must be deemed* to have claimed and to have been allowed the amount of obsolescence referred to by him. If the evidence clearly showed that Rainier did in fact claim such obsolescence or that it had in fact been allowed, there would have been no necessity for the Commissioner to assert that the facts "must be deemed" to be as he alleges.

The only amount ever actually claimed by Rainier as a deduction for obsolescence was $174,188.84 for the year 1919. [R. 127.] It is true that the claim for abatement of 1919 taxes alleged that the value of Rainier's good will at March 1, 1913, was $542,240.27. [R. 126.] *But this amount was not claimed as a deduction.*

The 1918 return had shown no net income—in fact, a loss of $11,668.17. [Ex. O, R. 892.] No obsolescence was deducted thereon. The 1919 return, which likewise claimed no obsolescence, disclosed net income in the sum of $174,188.84. Shortly after filing that return the claim for abatement was filed (July, 1920).

The claim for abatement expressly stated that no deduction for obsolescence was claimed for the year 1918. [R. 126.] A deduction for 1919 was claimed in an amount sufficient only to offset the income for that year—$174,-188.84. [R. 127.] The "remaining balance of Good Will loss" was expressly stated in the claim to be applicable to "future income" and was not sought as a deduction. [R. 126-127.]

Four years later, in 1924, the Commissioner acted upon this claim for abatement of 1919 taxes, by reducing the value of good will from $542,240.27 to $406,680.20, and

determined that Rainier's claimed deduction of $174,188.24 for the year 1919 would be allowed only to the extent of $59,153.48 and the balance of the claimed deduction ($115,035.36) would be disallowed as a deduction for that year. [R. 117-118.] He then "allocated" the minor sum of $2,464.77 to the year 1920—a net loss year for which no deduction for obsolescence had been claimed. [R. 118.]

The balance ($345,061.95) of the good will as determined by him, representing the $115,035.36 which he had disallowed for 1919 and the portion which the taxpayer had alleged generally to be applicable to future income, was "allocated" by the Commissioner to the year 1918—the year in which the taxpayer's return already showed a net loss of $11,668.17, as we have heretofore stated.* We have placed the word "allocated" in quotation marks because that is the precise word used in the stipulation [R. 118] and in The Tax Court's findings of fact. [R. 60.]

Based upon the above facts The Tax Court was obviously correct in concluding in effect that the only obsolescence actually claimed by the taxpayer was for the year 1919 and in the sum of $174,188.84; and that an amount was not "allowed" where it had never been claimed by the

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*The Commissioner also revised Rainier's 1918 return so that it showed net income of $78,983.92 instead of a net loss of $11,-668.17. Whether or not at the late date in 1924 the statute would have barred collection of a deficiency based upon net income of $78,983.92 for the year 1918 is not shown in the record; presumably it would have, although for the purposes of this action the taxpayer conceded that a tax benefit of $78,983.92 was realized from the Commissioner's "allocation."

taxpayer but had merely been assigned or "allocated" by the unilateral action of the Commissioner to any year that happened to suit his preference. The Tax Court declared [R. 72]:

> "* * * In other words, a deduction 'allowed,' but not claimed or actually taken, can hardly be said to be 'allowed' where there was no basis in the statute for such an allowance. * * *"

The fallacy in the Commissioner's argument is clearly reflected in his summary of argument (Br. 24):

> "* * * Since Rainier sought a refund of taxes for 1919 based on a claim for a deduction for obsolescence *in an amount greater than the amount of $406,-680.20* allowed by the Commissioner and allocated by him to the years 1918 through 1920 pursuant to such claim, and since Rainier received tax benefits therefrom for both 1918 and 1919, Rainier must be deemed to have claimed obsolescence in the amount of $406,-680.20. That amount was therefore 'allowed' * * *." (Emphasis added.)

The inaccuracies in the above statement are obvious. (1) The taxpayer did not claim a deduction greater than $406.680.20 in seeking a refund of 1919 taxes (its claimed deduction was only $174,188.84); (2) the Commissioner did not "allow" the sum of $406,680.20, for that was the very question at issue and The Tax Court concluded otherwise; (3) the Commissioner allocated the amount of $406,680.20 to the years 1918 through 1920, but certainly he did not do so "pursuant to such claim." He did so in

direct repudiation of the claim, which explicitly stated that no part was applicable to the year 1918.*

The case primarily relied upon by the Commissioner, *Virginian Hotel Co. v. Helvering,* 319 U. S. 523, 87 L. Ed. 1561, was different—in fact, just the reverse of the present situation. The taxpayer in that case had deducted on its returns depreciation of carpets and other equipment, using estimated economic useful lives of 6⅔ and 10 years, respectively. These deductions were not challenged by the Commissioner until 1938, when for that year and future years he determined that the useful lives of the properties were longer, to-wit, 12½ and 20 years, respectively. The taxpayer agreed to the revised estimate of economic useful lives; but it argued that in determining the depreciable sum remaining at the beginning of 1938 (to which the new rates should be applied) the excessive deductions in prior years had not been "allowed" unless they had offset taxable income. The Supreme Court merely held that under the American system of self-assessment all deductions claimed on income tax returns are allowed within the meaning of the statute unless they are challeged by the Commissioner. "* * * Apart from contested cases, that is indeed the only way in which deductions are 'allowed.' * * *"

It is difficult to understand how that case can justify a similar conclusion where the basic fact is that the amount in question had never been claimed as a deduction by the taxpayer.

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*It may be noted that there was no practical way for the taxpayer to complain of the Commissioner's action, for it was soon determined by this Court and others that no obsolescence whatever was allowable. See *Landsberger v. McLaughlin,* 9 Cir. 26 F. (2d) 77; *Red Wing Malting Co. v. Willcuts,* 8 Cir. 15 F. (2d) 626, cert. den. 273 U. S. 763.

Other cases cited by the Commissioner are entirely consistent with the position of Rainier. Rainier certainly does not dispute the principle that depreciation may be "allowed" although not legally "allowable"—a proposition for which the Commissioner cites *Belknap v. United States* (W. D. Ky.), 55 F. Supp. 90. That case illustrates the principle but did not decide it, for the taxpayer there conceded that the cost basis of property sold in 1938 should be reduced by depreciation erroneously *deducted on his returns for 1930 and 1931* and allowed by the Commissioner without challenge. The issue in that case was whether the Commissioner was correct in determining that depreciation was "allowable" for years after 1931 and therefore should serve to further reduce the cost basis even though the taxpayer had claimed no depreciation for such years. This issue was resolved against the Commissioner on the ground that the property in question was not of a depreciable character and hence there should be no reduction in basis for years subsequent to 1931, because depreciation was neither allowable nor had it been claimed and allowed.

This case is similar to the present case in that obsolescence of good will was not "allowable," and Rainier concedes, as did the taxpayer in the *Belknap* case, that its basis must be reduced by the obsolescence erroneously allowed. But Rainier contends, in line with the actual holding in the *Virginian Hotel Co.* case, that obsolescence is not allowed unless the taxpayer claims it for a specific year and the Commissioner allows the claimed deduction to stand without challenge. The only obsolescence ever claimed by Rainier was the sum of $174,188.84, which, as we have seen, was partially disallowed by the Commissioner. The amount of $406,680.20 referred to by the

Commissioner was his determination of the value of Rainier's good will, but that amount certainly was never allowed by him pursuant to a deduction claimed by Rainier.

Old Colony Trust Co. v. White (D. Mass.), 34 F. (2d) 448, also cited by the Commissioner, dealt with the converse of the above situation, and simply held, which no one is disposed to question, that "allowable" depreciation reduces the basis of property even though none is actually claimed or allowed.* That case has no relevancy here. Similarly, in *Hall v. United States* (Ct. Cls.), 43 F. Supp. 130, certiorari denied, 316 U. S. 664, it was held that the 1913 value of two leaseholds must be reduced by "allowable" depreciation, notwithstanding the Commissioner had not permitted any deduction for depreciation either to the trustee or the income beneficiaries. Implicit in the Court's opinion is the fact that depreciation was "allowable"; and the principal discussion in the case is whether the taxpayer (an income beneficiary) could recoup against the taxes assessed on the gain from the sale of the property the excessive taxes she had paid in prior years as a result of the Commissioner's error in denying her pepreciation deductions in those years.

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*The case dealt with the hardship situation where depreciable property was held in trust and the entire income was paid to a life beneficiary—a situation that was alleviated by the 1928 Revenue Act and all subsequent Acts by providing that the depreciation should be apportioned among the trustee and income beneficiaries on the basis of the income allocable to each, unless otherwise directed by the trust instrument. See Section 23(1) of the Internal Revenue Code. Before 1928, including 1921, the year involved in the *Old Colony Trust Co.* case, the depreciation was "allowable" only to the trustee; but there was no question but that it *was* allowable to the trustee. See Report of Conference Committee accompanying the Revenue Act of 1928, House Report 1882, 70th Congress, 1st Session, pages 11-12.

Since we are dealing in the present case with obsolescence that was not "allowable" it is difficult to see the applicability of cases which hold only that "allowable" depreciation must be subtracted from the basis of property, whether "allowed" or not. As heretofore stated, Rainier does not dispute the principle for which those cases stand.

The other two cases cited by the Commissioner on this issue are equally inapposite. *Helvering v. Owens,* 305 U. S. 468, 83 L. Ed. 292, was concerned with "casualty losses" flowing from the destruction of or damage to non-business property that is held solely for pleasure or personal uses. Although such property is depreciable in character, depreciation may not be claimed on a tax return because it is not used in business or held for the production of income; nor need depreciation be taken into account in computing gain from its sale, since depreciation is neither allowed nor allowable. But the tax laws, inconsistently perhaps, allow a deduction for the loss of such property *by casualty;* and the *Owens* case limited the amount of the deduction for casualty loss to the fair market value of the property immediately before the casualty. This was only reasonable, for the code allows a deduction for losses only to the extent sustained in the taxable year; and obviously a casualty loss would represent a loss suffered in that year only to the extent of the then value of the property. The decrease in value representing depreciation sustained in prior years could not be carried forward and deducted under the guise of an increased casualty loss; and this would be true even though deductions for the prior depreciation actually sustained were not allowable or allowed for tax purposes due to the personal or pleasurable nature of the property.

The other case, *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301, 75 L. Ed. 1049, merely held that the allowable deduction for depletion in 1918 could not exceed the amount of depletion which the parties agreed had actually been sustained during that year; that such deduction could not be increased by taking into account the excess of depletion sustained in prior years over the depletion allowed and allowable during those prior years; but that, upon authority of *United States v. Ludey,* 273 U. S. 295, 71 L. Ed. 1054, 1059, such excess would not be deducted from the basis in computing gain upon a subsequent sale of the property.

We fail to see the materiality of these cases or how they can afford the Commissioner support in his contention that more obsolescence was "allowed" to Rainier than The Tax Court found.

In the final analysis, aside from the obvious correctness of The Tax Court's conclusion, the present situation is an ideal one for application of the *Dobson* rule, for there is no dispute between the parties in respect of the controlling legal principles and the evidence clearly warranted—indeed it required—The Tax Court's conclusions that only $174,-188.84 of obsolescence had been claimed, and not even that amount had been allowed by the Commissioner.

The *Dobson* case itself involved a question under Section 113(b)(1)(A) of the code, and the Supreme Court made the following statement, which is equally applicable to the present question under Section 113(b)(1)(B):

> "* * * What, in the circumstances of this case, was a proper adjustment of the basis was thus purely an accounting problem and therefore a question of fact for the Tax Court to determine. Evidently the

> Tax Court thought that the previous deduction were not altogether 'properly chargeable to capital account' and that to treat them as an entire recoupment of the value of taxpayer's stock would not have been a 'proper adjustment.' We think there was substantial evidence to support such a conclusion."

The Commissioner has been able to point to no evidence or principle of law establishing error on the part of The Tax Court in the present case. Its findings and decision on this issue should therefore be affirmed.

Conclusion.

The decision of The Tax Court should be affirmed.

Respectfully submitted,

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No. 11548

In the United States Circuit Court of Appeals for the Ninth Circuit

STIMSON MILL COMPANY, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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Acting Assistant Attorney General.
HELEN R. CARLOSS,
CARLTON FOX,
Special Assistants to the Attorney General.

FILED
MAY 31 1947
PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11548

Stimson Mill Company, a Corporation, petitioner

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion is that of the Tax Court (R. 21–40), which is reported in 7 T. C. 1065.

JURISDICTION

The petition for review seeks special relief from the excess profits tax imposed by Subchapter E of Chapter 2 of the Internal Revenue Code for the taxable year 1942, to the extent of approximately $12,000. (R. 41–53.) The petitioner herein, Stimson Mill Company, hereinafter called the taxpayer, is a Washington corporation, with its principal office at Seattle, Washington, and for the taxable year in question filed its income and excess profits tax returns with the Collector of Internal Revenue for the District of

Washington, at Tacoma, Washington. (R. 22.) The Commissioner duly determined a deficiency in the taxpayer's excess profits tax for the taxable year in the sum of $2,106.08, and the taxpayer filed a timely application for relief under Section 722 of the Code, claiming a refund of excess profits tax for that year, and filed the same with the Commissioner of Internal Revenue in Washington, D. C., on December 26, 1944. (R. 22–23.) The Commissioner determined that the taxpayer was not entitled to any relief under Section 722, and notice of disallowance of the taxpayer's claim for such relief was issued in accordance with the requirements of Section 732. (R. 22–23.) Within ninety days thereafter the taxpayer filed a petition with the Tax Court under Section 732 for a redetermination of its claim for such relief.[1] (R. 3–12.) The decision of the Tax Court on review of the special division thereof under Section 732, affirming the Commissioner's determination disallowing the claim, was entered November 1, 1946. (R. 41.) The petition for review by this Court was filed January 28, 1947, allegedly under the provisions of Sections 1141 and 1142. (R. 42.) The respondent Commissioner challenges the jurisdiction of this Court to review such determination under Sections 1141 and 1142, or at all, because of the provisions of Section 732 (c) which prohibit review of the Tax Court's determina-

[1] The assertion of the taxpayer (Br. 1–2) that its petition for review of the Commissioner's denial of Section 722 relief was filed under Section 272 of the Code, as well as under Section 732, is pointless. For, obviously, the only section granting the taxpayer any right of review of such decision is Section 732.

tion of any question necessary solely under Section 722, as is the question in the instant case. The Commissioner accordingly moves this Court to dismiss the taxpayer's petition herein for want of jurisdiction to review the Tax Court's decision in this proceeding, in view of the provisions of Section 732 (c).

QUESTION PRESENTED

Whether this Court has jurisdiction to review a determination by the Tax Court that the taxpayer was not entitled to relief under Section 722 of the Internal Revenue Code from its excess profits tax liability imposed under Subchapter E of Chapter 2 of the Code, in view of the provisions of Section 732 (c) thereof prohibiting review by any court of the Tax Court's determination of any question necessary solely by reason of Section 722.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are contained in the Appendix, *infra*.

STATEMENT

All of the facts were stipulated, and the Tax Court adopted the stipulation of facts as its findings of fact. Such stipulation is as follows, except that the word "petitioner" has been changed to "taxpayer" (R. 22–27):

> 1. The taxpayer is a corporation organized under the laws of the State of Washington, with its principal office at * * * Seattle, Washington. Taxpayer's income and excess profits tax returns for the * * * year 1942

* * * were filed with the Collector of Internal Revenue for the District of Washington, at Tacoma, Washington. (R. 22.)

2. The taxpayer made a timely "Application for Relief Under Section 722 of the Internal Revenue Code" (Form 991) claiming a refund of excess profits tax for the taxable year 1942, which claim was filed with the Commissioner of Internal Revenue at Washington, D. C. (R. 22.)

3. Taxpayer's excess profits tax return (Form 1121) for the taxable year 1942 disclosed a total liability for excess profits tax in the amount of $249,262.34, which has been assessed. Thereafter, the Commissioner issued a statutory notice dated December 26, 1944, * * * in which it was determined that there was an additional liability in excess profits tax for said year in the amount of $2,106.08, making a total liability for said year of $251,368.42. (R. 22–23.)

4. In determining the liability for excess profits tax for the year 1942, the Commissioner also determined in the statutory notice dated December 26, 1944, that the taxpayer is not entitled to any relief under section 722 of the Internal Revenue Code. Accordingly, the claim for refund asserted in taxpayer's application for relief (Form 991), was disallowed for the year 1942 and notice of such disallowance was issued in accordance with the requirements of section 732 of the Internal Revenue Code. (R. 23.)

5. In computing its excess profits tax, the taxpayer is entitled to use an excess profits tax credit based upon net earnings within the "base

period years" 1936 through 1939, in accordance with section 713 of the Internal Revenue Code, as amended. (R. 23.)

6. In determining the liability of the taxpayer for excess profits tax for the year 1942, * * * the respondent has computed an excess profits credit based upon the actual average base period net income computed under section 713 (e). Under the provisions of section 713 (e) (1) the benefits of the so-called 75% rule, which automatically increased excess profits net income for the year 1938, were secured to the taxpayer. The excess profits credit using said actual income in accordance with the notice of deficiency attached to the petition, is in the amount of $78,662.68, computed as follows (R. 23–24):

Year	*Actual base period net income*
1936	$89, 422. 67
1937	63, 706. 57
1938	38, 127. 75
1939	111, 839. 77
Aggregate for four base-period years	303, 096. 76

	Adjustment under section 713 (e) (1) of Code
Aggregate of 1936, 1937 and 1939	$264, 969. 01
75% of ⅓ for 1938	66, 242. 25
Total	331, 211. 26
Average	82, 802. 82
Excess-profits credit 95%	78, 662. 68

7. Taxpayer has established by the information submitted that its normal operation or output was interrupted in the year 1937 by strikes or other events peculiar in its experience, as provided by section 722 (b) (1), I. R. C. It

has also established that because of those events the actual earnings for 1937 in the amount of $63,706.57 were abnormally low. On the basis of the facts submitted, the fair and just amount representing normal earnings which would be used by the taxpayer as its constructive average base period net income under the provisions of section 722 (exclusive of section 713), for the year 1942 would be determined after reconstructing earnings for the year 1937 (prior to taxes) from the actual amount of $63,706.57 to the reconstructed amount of $85,263.34. The taxpayer is not entitled to any other or further constructive adjustments to actual earnings in the remaining base period years 1936, 1938 and 1939 under section 722 of the Code as presently constituted. (R. 24–25.)

8. The taxpayer, pursuant to its duly filed applications for relief under section 722, I. R. C., for the taxable years 1940 and 1941, established by information submitted that its normal operation or output was interrupted in 1937 by strikes or other events peculiar in its experience, as provided by section 722 (b) (1), I. R. C. With respect thereto the same determination was made as to 1937 and as to the excess profits credit after the application of section 722, as set forth in paragraph (7), above. However, the excess profits credit of $77,105.22 so determined was greater than the excess profits credit under section 713, which was used by the taxpayer in its returns for 1940 and 1941 in the computation of its excess profits tax for said years for the reason that the provisions of section 713 (e) (1) were not applicable with respect to such years. Accordingly, the taxpayer was allowed an in-

crease in its excess profits credit and corresponding tax benefits for 1940 and 1941 by reason of the application of section 722. (R. 25.)

9. If, as taxpayer contends, the corporation is entitled under the law to compute its excess profits credit for the year 1942 by reconstruction of its base-period income under section 722 as set forth in paragraph 7 of the stipulation, and also by application of the provisions of section 713 (e) (1) of the Code, the excess profits credit to be used in determining its excess profits tax liability for said year is the amount of $85,-062.34, computed as follows (R. 25–26):

Year	*Base period net income reconstructed under section 722*
1936	$89, 422. 67
1937	85, 263. 34
1938	38, 127. 75
1939	111, 839. 77
Aggregate for four base-period years	324, 653. 53

	Adjustment under section 713 (e) (1) of Code
Aggregate of 1936, 1937, and 1939	$286, 525. 78
75% of ⅓ for 1938	71, 631. 44
Total	358, 157. 22
Average	89, 539. 31
Excess profits credit 95%	85, 062. 34

10. Taxpayer does not contest the proposed deficiency in excess profits tax as set forth in the statutory notice, except by reason of its claim that it is entitled to relief under section 722 of the Code in addition to the benefits provided by section 713 (e) (1). Accordingly, it is agreed that the proposed deficiency in the amount of $2,106.08 as set forth in the statu-

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tory notice dated December 26, 1944, is due and has been properly assessed by the respondent since the petition was filed. (R. 26.)

11. If it is held, in accordance with the respondent's determination in the statutory notice, that taxpayer is not entitled to relief under section 722 in addition to the benefits allowed by section 713 (e) (1) of the Code, then this Court may enter its decision that there is no further deficiency in excess profits tax due from, or overpayment in such tax due to, the taxpayer for the year 1942, and that taxpayer's correct liability in excess profits tax for said year is in the amount of $251,368.42. (R. 26–27.)

12. If it is held, in accordance with the taxpayer's contention in this proceeding, that the taxpayer is entitled to compute its excess profits credit for the taxable year 1942 using both sections 722 and 713 (e) (1) of the Code, then it is agreed that taxpayer's excess profits tax credit is to be computed in the manner specified in paragraph 9 of this stipulation, above, and that taxpayer has overpaid its excess profits tax for said year in an amount to be determined in accordance with a recomputation of liability under Rule 50 of The Tax Court's Rules of Practice. (R. 27.)

SUMMARY OF ARGUMENT

Under Section 732 (c) of the Internal Revenue Code, this Court is without jurisdiction to review the decision of the Tax Court in this case, for the question which the Tax Court decided was one arising solely by reason of Section 722.

A. The Tax Court sustained the Commissioner's denial of Section 722 relief from the excess profits tax imposed by Subchapter E of Chapter 2 of the Internal Revenue Code. In so doing, it rejected the taxpayer's contention that in constructing its base period net income under Section 722 (a) and (b) (1), the adjustment made therein for the purpose of computing the credit under Section 713 (e) (1) in determining the tax without regard to Section 722 relief should have been reflected. The scheme of the statute is to tax at high rates all profits above a statutory norm represented by the average of the actual net income of the taxpayer during the base period years 1936 to 1939, inclusive. In this case, the credit was determined under Section 713 (e) (1). The taxpayer claimed and was allowed the credit determined under Section 713 (e) (1) in computing tax under Subchapter E. No appeal was taken by it from the Commissioner's deficiency determination in excess profits tax, which reflected such allowance, and it is stipulated that such deficiency is due. Therefore, the only possible relief from the tax is under Section 722. Section 722 (a) provides that when the taxpayer establishes that the tax is excessive or discriminatory, and the extent thereof, a constructive average base period net income is to be used instead of the average base period net income as otherwise computed under Subchapter E. In this case, only the construction of the taxpayer's base period net income in the year 1937 was required, because only in that year were there abnormalities, such as are listed in Section 722 (b). Section 722 relief was

nevertheless denied because the taxpayer's constructive average base period net income determined under Section 722 was less than its average base period net income determined under Section 713 (e) (1). However, it would not have been, if, as the taxpayer contends, the adjustment made in the taxpayer's net income under Section 713 (e) (1) in the base period 1938 year were reflected in the constructive base period net income under Section 722 (b) (1). The taxpayer's statement of the problem in the form of a claim for a Section 713 (e) (1) credit, reflecting the Section 722 construction of its base period net income does not alter the fact that there is here involved only the question whether the Section 722 construction should reflect the Section 713 (e) (1) adjustment. There can be no recomputation of the Section 713 (e) (1) credit, for Section 722 (d) expressly provides that the excess profits tax shall be determined and paid without benefit of Section 722, and the applicable decisions so hold. Hence, the appeal here is not justifiable under Section 1141, upon which the taxpayer relies, but is prohibited under Section 732 (c), because the determination of the question is one necessary solely under Section 722. The taxpayer's attack on the regulations, which require the Section 722 construction without reflecting the 713 (e) adjustment, is pointless. Nor was the Commissioner or the Tax Court performing a purely ministerial duty in determining that the taxpayer was not entitled to Section 722 relief. If this were true, the taxpayer's remedy would be by mandamus to

compel the performance of such duty, in which case, however, neither the Commissioner's nor the Tax Court's construction of Section 722 would be subject to review, any more than it is subject to review here. The instant proceeding is, however, not one to compel the performance of such a duty.

B. This Court is not required to construe Section 722; but, in any case, Section 722 may, and therefore must, be so construed as to implement the purpose of Congress, as expressed in Section 732 (c), to give finality to the Tax Court's disposition of claims for Section 722 relief.

1. The Regulations prohibiting the use of Section 713 (e) adjustment in the construction of the taxpayer's base period net income under Section 722 support the Government's construction of Section 722. These Regulations are reasonable and cannot be cast aside even if another view of the construction of the section were tenable.

2. In its opinion the Tax Court has demonstrated that the average base period net income under Section 713 is a concept limited to the purposes of that section only, no statutory authority appearing for applying the same concept in conection with the relief afforded by Section 722.

3. Congress did not and could not have intended the Section 713 (e) (1) adjustment of the taxpayer's base period net income to become a factor in the construction of such income under Section 722, because such method of applying Section 722 does not establish the "fair and just amount representing normal earnings"

to be used as a "constructive average base period net income" under Section 722, as required by subsection (a) thereof. Contrary to the taxpayer's contention, there must be a comparison between the two. In other words, the average base period net income as adjusted under Section 713, must be placed in juxtaposition with what its normal earnings would have been, if abnormalities in its actual income of the kind mentioned in Section 722 (b) had not existed.

ARGUMENT

Under Section 732 (c) of the Internal Revenue Code, this Court is without jurisdiction to review the decision of the Tax Court in this case

A. The question whether the adjustment made in the taxpayer's net income for the base period year 1938 under Section 713 (e) (1) of the Code must be used as a factor in the construction of its base period income under Section 722 (a) of (b) thereof, involves the determination and a question necessary solely by reason of Section 722, within the meaning of Section 732 (c)

By its decision, the Tax Court sustained (R. 40) the Commissioner's denial (R. 23) of the taxpayer's claim to relief from the excess profits tax for the taxable year 1942, under the provisions of Section 722 (a) and (b) of the Internal Revenue Code (Appendix, *infra*) (R. 22). The taxpayer seeks review at the hands of this Court of the Tax Court's decision on the ground that it misinterpreted Section 722 (a) and (b), in that it refused to use the adjustment made in the taxpayer's net income for the base period year 1938 under Section 713 (e) (1) (Appendix, *infra*), as a factor in the construction of its base period net income under Section 722. The Commissioner contends

that the taxpayer's claim for relief under Section 722 involves the determination of a question necessary solely by reason of that section, within the meaning of Section 732 (c) (Appendix, *infra*), which provides that the determination of such question shall not be reviewed or determined by any court or agency except the Board of Tax Appeals, now the Tax Court.

Briefly, the scheme of the excess profits tax statute (Subchapter E of Chapter 2 of the Code) is to tax at high rates all profits above a statutory norm. This is accomplished by a credit based upon the average of the actual net income of the taxpayer for the period selected as normal (namely the four years, 1936 to 1939, inclusive), computed with a possible adjustment under Section 713, or a percentage of invested capital computed under Section 714, whichever produces the lower tax. Congress, however, recognized that, if this method of computing income subject to excess profits tax were left as an inflexible yard-stick, excessive and discriminatory taxes would result in the case of many corporations whose base period earnings were not representative of their normal earnings, because of various abnormalities occurring in the base period. It was because of this fact that Congress enacted Section 722, the provisions of which are hereafter more fully explained.

It suffices here to say that Section 722 is a relief provision. In this respect, it is similar to Section 721, which this Court had under consideration in the case of *James F. Waters, Inc.* v. *Commissioner,* decided March 19, 1947 (1947 C. C. H., par. 9196). It is de-

signed to give taxpayers relief from the excess profits tax imposed by Subchapter E in certain so called hardship situations, by way of an excess profits credit based on a constructive average base period net income in lieu of the average base period net income of the taxpayer otherwise determined under Subchapter E, or more specifically in this case under Section 713 (e) (1), as stated. Section 722 is superimposed, as it were, upon those sections of Subchapter E which provide for the determination of the excess profits tax, including, of course, Section 713 (e) (1). As hereinafter more fully explained, Section 722 cannot, and does not, come into play until the amount of the tax has been determined and paid and application for relief under the section has been made to the Commissioner by way of a claim for refund of the tax, in all or in part, pursuant to the provisions of Section 732 (a) (Appendix, *infra*).

It is for this reason that, contrary to the taxpayer's contention (Br. 79–80), the relief sought may be analogized—as, indeed, this Court did in the *Waters* case, *supra,* to the case of Section 721 relief—to the grant of relief by way of special assessment from the 1918 excess profits tax. There, also, the relief sections were superimposed upon the excess profits tax provisions, and the grant of relief thereunder was likewise made to depend upon the exercise of both judgment and discretion on the part of the Commissioner, Moreover, the statute there, as here, generally authorized review of the Commissioner's determination by the Board of Tax Appeals, though, unlike in the case

of the excess profits here involved, there was no express provision in the earlier Acts denying judicial review in special assessment cases.[2]

As originally enacted by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, Section 722 of the Code contained but five lines and gave the Commissioner plenary power to adjust abnormalities affecting either income or capital, subject to review by the Board of Tax Appeals. It was considered at the time, however, that the section as then enacted was merely a stop-gap provision, written in the most general terms pending a study by the staffs of the Treasury and the Joint Committee on Internal Revenue Taxation, and consultation with taxpayers and tax practitioners, with a view to formulating a more prac-

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[2] In denying the courts the power to review the Board's determination in these cases, the Supreme Court held that no challenge could be made thereof in the courts, except for fraud or other irregularities. *Williamsport* v. *United States*, 277 U. S. 551, 561; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Duquesne Steel Foundry Co.* v. *Commissioner*, 41 F. 2d 995 (C. C. A. 3rd) affirmed *per curiam*, 283 U. S. 799, on the authority of *Williamsport Co.* v. *United States*, *supra; Welch* v. *Obispo Oil Co.*, 301 U. S. 190. Nor can there be doubt any longer that, in the absence of fraud or other irregularities, neither the determination, nor the factors used in computation, nor the result itself, is open to review. The determination cannot be judicially reviewed, however the problem may be stated, or upon what reasoning its solution may be sought. *Cleveland Automobile Co.* v. *United States*, 70 F. 2d 365, 368 (C. C. A. 6th), certiorari denied, 293 U. S. 563. It is to be noted that in these cases both *nisi prius* reviews of the Commissioner's determination and appellate reviews of such lower court decisions were involved, as well as reviews by appellate courts of decisions of the Board of Tax Appeals under both the 1924 Act, which provided that they were to be regarded as *prima facie* correct, and under the 1926 Act which provided that they should be final.

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tical version for relief.[3] Accordingly, the provisions of Section 722 were extensively amended by Section 6 of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17. These amendments were by Section 17 thereof made effective as of the date of the Excess Profits Tax Act of 1940, being Section 201 of the Second Revenue Act of 1940, above mentioned, which, as stated, contained the original Section 722. The provisions of Section 722 were again amended by Section 222 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and, as so amended, were made applicable to all years subsequent to December 31, 1939. It is the provisions of Section 722 as thus amended that are applicable here.[4]

As indicated, the taxpayer claimed an excess profits credit for the taxable year 1942 computed under Section 713 (e) (1). Thus, since its actual net income in the base period year 1938 was less than 75% of its actual net income for the remaining base period years, 1936, 1937 and 1939, it adjusted its average base period net income under the provisions of that section by substituting the amount of $66,242.25 (being 75% of its average net income in the taxable years 1936, 1937 and 1939), for its actual net income in 1938 of $38,127.75.

[3] See H. Conference Rep. No. 3002, 78 Cong., 3d Sess., p. 52 (1942–2 Cum. Bull. 548), as also Internal Revenue Bulletin on Section 722, Internal Revenue Code for November, 1944, p. 1.

[4] Various subsections of Section 722 were thereafter amended by Section 1 of the Act of March 31, 1943, c. 31, 57 Stat. 56; by Section 2 (b) of the Act of December 17, 1943, c. 346, 57 Stat. 601, and by Section 206 of the Revenue Act of 1943, c. 63, 59 Stat. 21. But by Section 122 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556, the excess profits tax provisions were made inapplicable for taxable years beginning after December 31, 1945.

As a result, the taxpayer's average base period net income was determined under that section in the amount of $82,802.82, and its excess profits credit at 95% thereof or in the amount of $78,662.68. (R. 23–24.)

Though the Commissioner allowed the credit as thus computed, and determined a deficiency in excess profits tax of $2,106.08 under Subchapter E, which reflected such credit (R. 22–23), no appeal was taken therefrom by the taxpayer. No question of the allowance of such credit against its adjusted excess profits tax net income, as computed under the provisions of Subchapter E, or as to the resultant deficiency in the tax determined by the Commissioner, as stated, was or could have been raised in the Tax Court in this proceeding for relief under section 722, and it is not and could not be raised here. Accordingly, the stipulation of the parties contains an agreement to the effect that the proposed deficiency is due and that it was properly assessed by the respondent. (R. 26.) That being so, the only relief from the tax admittedly correctly determined and due, which the taxpayer sought, or which it could have obtained, was under the provisions of Section 722. Thus it was further stipulated and found by the Tax Court that the taxpayer timely filed an application for relief under Section 722 (d) (Appendix, *infra*), on the form provided for that purpose, claiming a *refund* of excess profits tax. (R. 22.) It will be noted that Section 722 (d) provides that the claim must be filed within the period prescribed by Section 322, which is the refund and credit section, subsections (a) and (b) (1) of which (Appendix, *infra*), in com-

bination, provide for the filing of a claim for refund of income, war profits, or excess profits tax, within three years from the time the return was filed, or within two years from the time the tax was paid.

As stated, Congress recognized that the yard-stick for measuring average base period net income as provided in Section 713 might not be an adequate standard of normal earnings, with the result that the excess profits credit computed under Section 713 would not suffice to remove such earnings from the tax. Accordingly, in the case of a taxpayer entitled to use the excess profits credit based on base period net income, Section 722 (a) provides that, if the taxpayer establishes (1) that the tax so computed results in an "excessive and discriminatory" tax, and (2) what would be a fair and just amount representing normal earnings of the taxpayer in the base period, to be used as a *constructive* average base period net income in lieu of its average base period net income "otherwise determined under this subchapter"—that is to say here under Section 713 (e) (1)—it shall in computing its excess profits tax, be entitled to use the constructive base period net income, determined under Section 722, instead of the average base period net income, as otherwise computed, as aforesaid. Thus, if the constructive average base period net income as established under Section 722 is greater than the average base period net income computed under Section 713, the credit is likewise greater, with the result that the adjusted excess profits net income subject to excess profits tax is reduced, and consequently also the tax.

Relief is then obtained, as stated, under Section 722 (d) by way of refund or credit. See *Uni-Term Stevedoring Co.* v. *Commissioner,* 3 T. C. 917, 919.

What constitutes an excessive and discriminatory tax is defined by Section 722 (b), which in this respect provides that the tax shall be considered to be excessive and discriminatory only if the taxpayer's average base period net income, as computed under Section 713, is an inadequate standard of normal earnings because of factors, circumstances, or occurrences specified in Section 722. Such factors are: (1) An interruption or dimunition of production during the base period; (2) depression in the taxpayer's business during the base period, due to temporary economic events or conditions generally prevailing in the particular industry of which the taxpayer's business was a part, which subjected it to a different profit cycle or to sporadic and high production profits, and (3) depression in the taxpayer's business resulting from any factor affecting its business, which might reasonably be considered as resulting in an inadequacy of normal earnings during the base period.

The Tax Court sustained the Commissioner's denial of the taxpayer's application for Section 722 relief, even though the Commissioner had constructed its net income for the year 1937 under the provisions of Section 722. The Commissioner constructed such income under that section to the extent of increasing it from $63,706.57 to $85,263.34, because he determined that the taxpayer's normal production or output in 1937 was interrupted by strikes or other events peculiar in

its experience necessitating such construction. Section 722 relief was nevertheless denied because the amount of the taxpayer's constructive average base period net income as determined under Section 722 was less than the amount of the average base period net income as determined under Section 713 (e) (1).

In sustaining the Commissioner's determination in this respect, the Tax Court rejected the taxpayer's contention that, in constructing its base period net income under Section 722 (a), the adjustment made in the taxpayer's actual net income for 1938 under Section 713 (e) (1) should be taken into consideration. In final analysis, the taxpayer's sole point here is that the Tax Court's rejection of such contention was erroneous.

It is quite true that before the Tax Court, as well as throughout its entire brief here, the taxpayer attempted to put the problem in a different form, by contending that, in computing its income for 1938 under Section 713 (e) (1) it was entitled to use the amount of $85,263.34, representing its 1937 net income as reconstructed by the Commissioner under Section 722 (a). And it is only on the theory that it is seeking a readjustment of its credit computed under Section 713 (e) (1) that the taxpayer professedly invokes the provisions for review of the Commissioner's deficiency determinations, granted this Court by Section 1141 of the Code. For, manifestly, so far as concerns its claim for relief under Section 722, as such, any right which the taxpayer may have to a review thereof is limited by Section 732 to a review by the Tax Court.

As the Tax Court said in its opinion (R. 33)—

> The statute does not permit computation under section 713 (e) (1) by using, for any base period year, not the actual income, but an income reconstructed under section 722 (a).

The Tax Court based this conclusion upon an analysis of Section 713 (e) (1) which it then proceeded to make. (R. 33–34.) Such analysis speaks for itself, and need not be repeated here. We desire, however, to point to an additional reason why the taxpayer would in no event be entitled to the hybrid credit which it has computed under Section 713 (e) (1), by the interpolation therein of its constructed base period net income under Section 722. (R. 26.)

This is that Section 722 (d) expressly prohibits the application of Section 722 in the computation of the excess profits tax, whether the excess profits credit computed under Section 713 or Section 714. In this connection, Section 722 (d) provides that the taxpayer shall compute its tax, file its return, and pay the tax shown thereon, without application of Section 722, and this requirement applies not only to the tax shown upon the return (see *Uni-Term Stevedoring Co.* v. *Commissioner, supra; Pioneer Parachute Co.* v. *Commissioner,* 4 T. C. 27; *Blum Folding Paper Box Co.* v. *Commissioner,* 4 T. C. 795; *Ceco Steel Products Corp.* v. *Commissioner,* 150 F. 2d 698 (C. C. A. 8th)), but to a deficiency therein determined by the Commissioner (*American Coast Line, Inc.* v. *Commissioner,* 159 F. 2d 665 (C. C. A. 2d)).

Beyond peradventure, therefore, a statement of the problem in the form of an alleged error on the Tax

Court's part in failing to allow the taxpayer a credit, computed after the allowance of Section 713 (e) (1) adjustment for 1938 which reflects therein the construction of its 1937 income under Section 722 (a), does not serve to alter the fact that the determination of the question here presented is one solely by reason of Section 722, within the meaning of Section 732 (c). But, as stated at the onset of our argument, that section prohibits review of that question here. See *James F. Waters, Inc.* v. *Commissioner, supra.*

If there were any doubt that the only question presented by the taxpayer for review here is one of the construction of Section 722, it is wholly dispelled by the fact that the taxpayer, itself, states (Br. 56–64) the question in terms of its challenge of the validity of the Commissioner's regulations promulgated under Section 722, namely Section 35.722–2 of Regulations 112. These provide, in effect, that in computing the amount of the taxpayer's constructive average base period net income under Section 722, in those cases in which that section is applicable, it is not entitled to use the rules provided by Section 713 (e) (1), relating to the increase of base period net income of lowest year of base period, and that, since the taxpayer's constructive base period net income is the just and fair amount representing normal earnings and will reflect adjustments for abnormally low base period years, a taxpayer having computed such amount is not entitled in addition to apply rules provided by Section 713 (e) (1).

The taxpayer's contention is not that Congress could not have denied Section 713 (e) (1) relief in con-

nection with a grant of Section 722 relief. It contends merely that Congress did not do so, but to the contrary granted such relief, and that the regulations are contrary to the meaning of Section 722 and defeat its purpose. Obviously, the taxpayer's contention that the regulations are legislative in character and, therefore, violate Article 1 of the Constitution adds nothing to its contention that they are contrary to the statute. The Regulations either correctly interpret Section 722, or they do not, and whether they do or not is, as stated, a question with which this Court will not concern itself any more than it will concern itself with the question as to whether or not there is factual basis for denying the taxpayer Section 722 relief. The Tax Court's determination is equally final in both instances.

Moreover, if, as the taxpayer contends (Br. 75–77), the function of the Commissioner in the circumstances here has been reduced to the performance of a mere ministerial duty, concerning which no determination by him was necessary, it is apparent that the taxpayer's only remedy is mandamus to compel the Commissioner to perform such duty. Section 732 (c) does not purport to protect either the Commissioner, or for that matter the Tax Court, in failing to perform such duty. In such event, however, interpretation of the law is not subject to review, *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324–325. As was said by the Court of Appeals for the District of Columbia in *Hammond* v. *Hull,* 131 F. 2d 23, 25:

> When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation

> placed by the officer upon the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious. For it is only in clear cases of illegality of action that courts will intervene to displace the judgments of administrative officers or bodies. Generally speaking, when an administrative remedy is available it must first be exhausted before judicial relief can be obtained, by writ of mandamus or otherwise.

But the proceeding here is neither in form nor in substance one to compel either the Commissioner or the Tax Court to perform a ministerial duty. Neither the Commissioner nor the Tax Court has refused to consider the taxpayer's claim for relief. Both have considered and disposed of it upon due consideration of the facts presented to them and the application of the pertinent statute and Regulations thereto. There is nothing left for the Tax Court to do, and nothing for the Commissioner but to carry its order into effect, if, indeed, he has not already done so. The only question which it is sought here to review is whether the Tax Court erred in its application of the law and Regulations to the facts. And, as has repeatedly been said, Section 732 (c) prohibits that.

B. Section 722 may, and therefore must, be so construed as to implement the purpose of Congress, as expressed in Section 732 (c), to give finality to the Tax Court's disposition of claim for Section 722 relief

So far we have undertaken to show that, regardless of the interpretation placed on Section 722 by the Commissioner and the Tax Court, this Court is without jurisdiction under Section 732 (e) to review the disposition which the Tax Court made of the tax-

payer's claim to Section 722 relief. The reason is that whatever the correct interpretation of Section 722 may be, the decision of the Tax Court involves only the determination of a question necessary solely by reason of Section 722, and its decision is final. It is our view that this Court is not called upon to interpret that section. See *James F. Waters, Inc.* v. *Commissioner, supra.* In order, however, to remove all possible doubt that the Tax Court's decision involves only such a question, we shall demonstrate that Section 722 can properly be construed as being totally independent of Section 713 (e) (1) and it should be so construed in order to implement, rather than to defeat, the purpose of Congress expressed in Section 732 (c) to give finality to the Tax Court's disposition of the taxpayer's claim to Section 722 relief.

The involved argument which the taxpayer makes in support of its objection to the Tax Court's construction of Section 722 is not convincing and does not, in any event, justify detailed analysis. An over-all answer should suffice to dispose of it. Such answer will be found, first, in the administrative interpretation of Section 722; second, in a consideration of Section 713; and finally in a consideration of Section 722, itself. We consider these in the order stated.

In passing, it should be stated, however, that the very foundation of the taxpayer's position here involves a contention, made not only in its so-called "Statement of the Case" (Br. 7–11), but in the third point of its argument (Br. 33–38), which is without statutory support whatever. The contention is that, under Section 722 as amended by Section 6 of the

Excess Profits Tax Amendments of 1941, and particularly under Paragraph 3 of Section 722 (b), as amended, relating to the rules of construction of Section 722 (a), the average base period net income computed under Section 722 (a) must be determined in accordance with its computation under Section 713, and that the amendments made by Section 222 of the Revenue Act of 1942 in the cognate provisions of Section 722 were not intended to and did not change this requirement. The fact of the matter is, however, that the amendments made by the Revenue Act of 1942 in Section 722, particularly in subsection (e) thereof, relating to the rules for the application of the section, entirely omitted the requirement that the constructive average base period net income computed under Section 722 (a) be determined in accordance with the computation of the average base period net income under Section 713. Nor is there anything in the committee reports, the taxpayer's contention to the contrary notwithstanding, which justifies its contrary conclusion.

1. As was pointed out in subpoint A, *supra,* Section 35.722–2 (b) (1) of Regulations 112, as amended by T. D. 5415, 1944 Cum. Bull. 404 (Appendix, *infra*), specifically provides that the Section 713 (e) (1) adjustment of the taxpayer's base period net income shall not be reflected in a constructive average base period net income computed under the provisions of Section 722.

At the outset, it should be stated that the taxpayer's contention (Br. 61–62), that the original Regulations allowed the constructive average to be computed as

provided by Section 713 (e) (1), is incorrect. For all that these Regulations provided was that the Commissioner might, in a proper case, take the principles of both Section 713 (e) (1) and Section 713 (f) into account, and then only to the extent that he deemed the application of such principles to be reasonably consistent with the conditions and limitations of Section 722 and of such sections. We submit that there is nothing in the unamended Regulations which justifies a conclusion that he might under any circumstances have been compelled to take the 75% adjustment provided for by Section 713 (e) (1) into account in the construction of the taxpayer's base period net income, under Section 722. We turn then to a consideration of the amended Regulations.

In its opinion (R. 31), the Tax Court said that the taxpayer had stated that its case must stand or fall on the validity of the Regulations. The Tax Court considered them as embodying not only a reasonable, but a correct, interpretation of the statute. It undertook to demonstrate this, both from the standpoint of the application of Section 713 (e) (1) in the determination of the taxpayer's excess profits tax income and the excess profits tax laid in respect thereof (R. 33–37), to which we have already referred in our subpoint A, and from the standpoint of the application of Section 722 in the grant of relief therefrom (R. 37–40).

It is, of course, well settled that a regulation cannot be struck down unless it is clearly an erroneous interpretation of the statute. The question is not whether the administrative determination is free from doubt,

but whether it is a reasonable one. Thus, even if another conclusion as to the legislative purpose could properly be reached, the regulation should not be cast aside, for it may be ignored only if unreasonable or inconsistent with the statute. *Brewster* v. *Gage,* 280 U. S. 327; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378. A consideration of Section 713 in its application to Section 722, as well as of Section 722, itself, will, we think, demonstrate the fact that the Regulations are not only reasonable, but that they correctly evaluate the Congressional intention. We shall consider the sections in their order, and, in addition to the Tax Court's exposition of them, submit the following:

2. The original Section 713, like the original Section 722, was first added to the Code by Section 201 of the Second Revenue Act of 1940. The portion of Section 713 (e) (1) here in question was added thereto by way of an amendment made by Section 215 of the 1942 Act. There was, therefore, no occasion, prior to the 1942 amendment of Section 713 (e), to construe Section 722 any differently from what we contend it should still be construed, namely, as a relief provision whose every criterion is to be found within its four corners. As stated in our subpoint A, Section 722 was considerably amplified by Section 6 of the Excess Profits Tax Amendments of 1941 and was again amended by Section 222 of the 1942 Act. But, there is nothing in either amendment, or in their legislative history, to warrant a conclusion that Congress intended Section 722 to be differently construed after the

amendment of Section 713 (e) than before. Indeed, the indications are all to the contrary.

As stated, Section 713 provides for the computation of the excess profits credit upon the basis of base period income in the computation of the excess profits tax. It so happens that the taxpayer's actual base period net income was subject to adjustment under Section 713 (e) (1); that is to say, since its 1938 net income was less than 75% of the average of the remaining three years in the base period, 75% thereof was substituted therefor.

As the Tax Court, in its opinion, has demonstrated (R. 34–37) ~~that~~ the average base period net income under Section 713 is a concept limited to the purposes of that section only, no statutory authority appearing for applying the same concept in connection with the relief afforded by Section 722 (R. 35). It would unnecessarily extend this brief to repeat here the Tax Court's argument in support of this conclusion.

3. However, as the Commissioner contended before the Tax Court (R. 32), the basic reason for the invalidity of the taxpayer's contention is that Congress did not, and could not have, intended Section 713 (e) (1) to become a factor in the reconstruction of the taxpayer's base period net income under Section 722, because such method of applying Section 722 does not establish the "fair and just amount representing normal earnings" to be used as a "constructive average base period net income," under Section 722, as required by subsection (a) thereof, and, therefore, that such method furnishes no basis for comparison

between what would be regarded as normal earnings in the base period, as constructed under Section 722 (b) (1), and the actual earnings in that period, as adjusted under Section 713 (e) (1). To state the problem another way, in order to obtain Section 722 relief, a comparison must necessarily be made between the amount of the average base period net income computed under Section 713 and the amount of the constructive average base period net income computed under Section 722. Only if the latter amount is greater than the former is Section 722 relief available.

But the taxpayer's proposed method of constructing base period net income under Section 722 eliminates all necessity for making such comparison, for it purports to construct the base period net income under Section 722 by the use of the mechanism for the computation of the excess profits credit provided by Section 713 (e) (1), including all of the factors involved therein excepting only the amount of the actual net income for the taxable year 1937, for which the amount as constructed under Section 722 (a) is substituted. As a result, moreover, a Section 713 (e) (1) adjustment of the taxpayer's net income for 1938 is made by taking into account 75% of the taxpayer's 1937 net income as constructed under Section 722, instead of 75% of its actual 1937 net income, as Section 713 (e) (1) provides.

Thus the Section 722 constructive average base period net income is merged into the Section 713 (e) (1) adjusted average base period net income; and,

by the same token, it is deprived of its Section 722 (a) function as a comparative. The result is not an excess profits tax credit based upon construction of the taxpayer's base period net income, reflecting what would, except for the abnormalities listed in paragraphs 1 to 4 of Section 722 (b), be regarded as its normal income in the base period years.

The taxpayer has called attention to a graph in Mim. 5807, 1945 Cum. Bull. 273, 274, showing corporation profits in the United States for the years 1918 to 1939, inclusive. From this it will be observed that such profits rose sharply in 1935; remained constant in 1936 and in the first half of 1937; then dropped sharply to a low point in 1938, immediately rising again, however, until they reached the 1936–1937 level in 1939. Obviously, the Section 713 (e) (1) adjustment of the taxpayer's 1938 income, which income was represented as normal in the graph, involves a substitution therefor of an arbitrarily determined larger amount. And, since this amount does not represent the taxpayer's normal earnings, it may obviously not be used as a basis for Section 722 relief. For the purpose of that section is to permit a construction of the taxpayer's base period net income only to the extent of eliminating such abnormalities as are listed in paragraphs 1 to 4, inclusive, of Section 722 (b), which have prevented it from being normal, and the condition which requires the Section 713 (e) (1) adjustment is not one of these.

On the other hand, as regards the year 1937, the taxpayer's income was lower than the normal as repre-

sented in the graph, because of strikes or other interruptions. It is for this reason that a construction thereof was required under Section 722 (b) (1), and such was actually made.

However, similar strikes or interruptions might conceivably also have occurred in 1938, likewise reducing the taxpayer's profits below its normal for that year, as represented in the graph. But, in such case, the construction of those profits under Section 722 would likewise have been of the taxpayer's actual net income in that year, and the amount thereof could not justifiably have been either greater or less than it would normally have been had such strikes or interruptions not occurred. Manifestly, the Commissioner could not under Section 722 have constructed the amount of the taxpayer's income either above or below normal, even though the amount as adjusted pursuant to Section 713 (e) (1) was greater or less than normal. It follows that, in the construction of the taxpayer's net income in any base period year, the normal, or what would, except for abnormalities listed in paragraphs 1 to 4, inclusive, of Section 722, have been the normal income in that year, must be used as a factor under Section 722.

We, therefore, submit that the Tax Court was clearly correct in stating in its opinion that, since the average base period net income under Section 713 is a concept limited to the purposes of that section, and no statutory authority appears for applying it in connection with relief afforded by Section 722 (R. 34–35), Section 713 (e) cannot be "exported" to Section 722

to furnish the only test of a "fair and just amount" or of "normal earnings" to be used as a constructive average base period net income (R. 36–37), and that Section 722 provides that the constructive average base period net income under that section shall in the determination of the tax be used "in lieu of the average base period net income otherwise determined under this chapter," which includes Section 713 (R. 38). Accordingly, the Tax Court correctly concluded (ibid.) that the language of Section 722 (a) indicated there was a difference between constructive average computed under Section 722 and the average determined under Section 713 (e); that it was inescapable that the average constructed under Section 722 must take the place of any average elsewhere determined in the same subchapter, and that nothing but identity of the constructive average base period net income and the average *otherwise* determined under the subchapter could prevent the substitution of the constructive average.

Of course, this is but another way of saying what we have said above, that, contrary to the taxpayer's contention (Br. 46), for purposes of comparison, the taxpayer's average base period net income as adjusted under Section 713 must be placed in juxtaposition with what its "normal earnings" would have been if abnormalities in its actual net income of the kind mentioned in Section 722 (b) had not existed.

Clearly, therefore, there is no justification here for so construing Section 722 as to cast the slightest doubt upon the power of Congress to withhold from the

courts the right to review the Tax Court's determination of any question necessary solely by reason of Section 722.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for want of jurisdiction to review the Tax Court's decision under Section 732 (c) of the Code.

Respectfully submitted.

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MAY 1947.

APPENDIX

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U. S. C. 1940 ed., Sec. 322.)

SEC. 713 [as added by the Second Revenue Act of 1940, c. 757, 54 Stat. 974, Sec. 201]. EXCESS PROFITS CREDIT—BASED ON INCOME.

* * * * *

(d) [as amended by the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, Sec. 4] *Average base period net income—Determination.*—

(1) *Definition.*—For the purpose of this section the average base period net income of the taxpayer shall be the amount determined under

subsection (e), subject to the exception that if the aggregate excess profits net income for the last half of its base period, reduced by the aggregate of the deficits in excess profits net income for such half, is greater than such aggregate so reduced for the first half, then the average base period net income shall be the amount determined under subsection (f), if greater than the amount determined under subsection (e).

* * * * *

(e) [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 215] *Average base period net income—General average.*—The average base period net income determined under this subsection shall be determined as follows:

(1) By computing the aggregate of the excess profits net income for each of the taxable years of the taxpayer in the base period, reduced by the sum of the deficits in excess profits net income for each of such years. If the excess profits net income (or deficit in excess profits net income) for one taxable year in the base period divided by the number of months in such taxable year is less than 75 per centum of the aggregate of the excess profits net income (reduced by deficits in excess profits net income) for the other taxable years in the taxpayer's base period divided by the number of months in such other taxable years (herein called "average monthly amount") the amount used for such one year under this paragraph shall be 75 per centum of the average monthly amount multiplied by the number of months in such one year, and the year increased under this sentence shall be the year the increase in which will produce the highest average base period net income;

* * * * *

(26 U. S. C. 1940 ed., Sec. 713.)

Sec. 722 [as added by the Second Revenue Act of 1940, *supra,* Sec. 201]. General re-

LIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME

(a) [as amended by the Revenue Act of 1942, *supra,* Sec. 222 (a)] *General rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayer generally occurring or existing after December 31, 1939, except that, in cases described in the last sentence of section 722 (b) (1) and in section 722 (c), regard shall be had to the change in the character of the business under section 722 (b) (4) or the nature of the taxpayer and the character of its business under section 722 (c) to the extent necessary to establish the normal earning to be used as the constructive average base period net income.

(b) [as amended by the Revenue Act of 1942, *supra,* Sec. 222 (a)] *Taxpayers using average earnings method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experence of such taxpayer.

* * * * *

(a) [as amended by the Act of December 17, 1943, 346, 57 Stat. 601, Sec. 1] *Application for relief under this section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on the return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

(26 U. S. C. 1940 ed., Sec. 722.)

SEC. 732 [as added by the Excess Profits Tax Amendments of 1941, c. 10, 5 Stat. 17, Sec. 9]. REVIEW OF ABNORMALTIES BY BOARD OF TAX APPEALS.

(a) *Petition to the Board.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H),

(I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

* * * * *

(c) *Finality of determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

* * * * *

(26 U. S. C. 1940 ed., Sec. 732.)

SEC. 1141. COURTS OF REVIEW.

(a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 347).

* * * * *

(26 U. S. C. 1940 ed., Sec. 1141.)

Treasury Regulations 112, promulgated under the Internal Revenue Code:

SEC. 35.722–2. *Constructive average base period net income.*—

*   *   *   *   *

(b) *Rules for determination.*—The determination of the constructive average base period net income must depend in each instance upon the facts and circumstances presented by the taxpayer and upon the provisions of section 722 forming the basis of the taxpayer's contention that its excess profits tax is excessive and discriminatory, i. e., if the taxpayer is entitled to use the excess profits credit based on income, the reasons why such credit is an inadequate standard of normal earnings, or if the taxpayer is not entitled to use such credit, the reasons why the excess profits credit based on invested capital is an inadequate standard for determining excess profits. No single test or standard of universal application can be prescribed pursuant to which every taxpayer must establish the fair and just amount representing normal earnings to be used as its constructive average base period net income. However, the following principles and rules must be observed in every case in which a constructive average base period net income is determined:

(1) [as amended by T. D. 5415, 1944 Cum. Bull. 404, 406] Section 722 (a) provides for the determination of a constructive average base period net income to be used in lieu of the actual average base period net income in those cases to which section 722 is applicable. Therefore, in computing such amount a taxpayer is not entitled to use the rules provided by section 713 (e) (1), relating to increase in base period net income of lowest year of base period, or by section 713 (f), relating to average base period net

income in case of increased earnings in last half of base period. Since the constructive average base period net income is the fair and just amount representing normal earnings and will reflect adjustments for abnormally low base period years, a taxpayer having computed such amount is not entitled in addition to apply the rules provided by section 713 (e) (1). In a proper case, however, the principles underlying section 713 (f) relating to growth may be taken into account in arriving at the fair and just amount representing normal earnings if, and to the extent that, the application of such principles is reasonable and consistent with the conditions and limitations of section 722.

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No. 11548

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY,
Petitioner.

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

Reply Brief for Petitioner.

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IN THE

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For the Ninth Circuit

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STIMSON MILL COMPANY,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

REPLY BRIEF FOR PETITIONER.

The respondent's brief is not responsive to the one essential issue (Br. Pet. pp. 56-58) on which his entire position depends with respect to the jurisdiction of this Court.

I. The determination of "a fair and just amount" representing normal earnings cannot include the computation of a constructive average base period net income.

The respondent fails to demonstrate how the "fair and just amount" can represent a constructive average when the statute provides for "a fair and just amount *representing normal earnings.*" He states the question obscurely (Br. Resp. pp. 10, 12) and answers it obscurely as a "basic reason" (Id. pp. 29, 28, 30).

While the respondent has final discretion to determine normal earnings (just as this Court properly held respect-

ing his discretion under section 721 to determine abnormal income attributable to other years, *James F. Waters, Inc.* v. *Commissioner,* March 19, 1947— C. C. H. 1947 par. 9196), *it is plain that if the determination of normal earnings under section* 722 *does not include the computation of the "average," such computation is only a ministerial duty involving no "determination" the review of which is precluded by section* 732(c).

A) Respondent avoids the common meaning of the statutory provision.

The jurisdiction question raised by the respondent, and the question respecting the proper "average," are not abstruse or difficult. Both can be answered in terms easily understood.

Assume that in connection with other computations a mathematical problem states: "Here are four figures to be used as an average."

Anyone, of course, would total the four figures, divide by four, and use the resulting "average" in making the further computations required in the problem.

If the problem involved the excess profits tax, and stated: "Here are four figures to be used as an 'average base period net income,'" then obviously one must look to the definition of "average base period net income" in order to use the four figures.

The latter essentially is the statutory provision of section 722(a), normal earnings for four years being used to compute the statutory "average" (such normal earnings being stipulated (Tr. pp. 16, 17) and involving no issue in the case at bar).

The same concept is indicated by section 713(e) (1): if earnings for one year are less than 75% of the average

of earnings for the other three years of the base period, "the amount *used* for such one year" shall be such 75%.

It is obvious that the normal earnings which are used as an average, are not themselves the average.

B) Statutory terms, and their equivalents, are not employed by respondent with their proper meaning.

By inference respondent creates the illusion that section 722 is independent of subchapter E (Br. Resp. pp. 9, 13, 14, 17) and at one point argues that section 722 is "totally independent of Section 713(e)(1)" (Br. Resp. p. 25). In fact section 722 is a subordinate provision of Subchapter E (Br. Pet. pp. 47, 48) and is dependent on section 713 and its subsections for connecting section 722 with the provisions which spell out the computation of the tax (Br. Pet. pp. 25-31).

Since section 722 is not an independent provision (as was the 1918 relief provision, Br. Pet. pp. 79, 80), the decisions cited by respondent (Br. Resp. p. 15) relating to the 1918 provision, have no bearing on the tax computation which is in issue here. Such decisions are applicable to the point on which this Court cited them in the *Waters* case, *supra,* namely, the respondent's final discretion to determine abnormal income attributable to other years (which is analogous to his final discretion to determine normal earnings) but those decisions are not applicable to the computation of the average, the ministerial act by which such earnings are to be used for the computation of the excess profits tax.

Normal Earnings.

In his "basic reason" sentence (Br. Resp. p. 29) respondent argues that Section 713(e)(1) is not "a factor in the reconstruction of taxpayer's base period net income under

Section 722." If he means that it is not a factor in determining normal earnings he is in agreement with petitioner, that the normal earnings are not the average. But the over-all inference seems to be to the contrary.

Respondent further argues that since the amount of the section 713(e)(1) adjustment "does not represent the taxpayer's normal earnings, it may obviously not be used as a basis for Section 722 relief" (Br. Resp. p. 31). Again the words are in agreement with this point I since the respondent can give relief under section 722 only by determining "normal earnings," but when the context is considered the inference is to the contrary.

In view of the inferences just mentioned, as well as the confusing use of terms in other respects in the Brief for Respondent, petitioner replies further by showing the statutory meaning of "Normal earnings" and terms used in connection therewith. "Normal earnings" are not an average (See Definition, Appendix H). A correction of earnings "in one or more taxable years in the base period," as provided in section 722(b)(1), because of a strike or other abnormal event, restores the earnings for each year to the level they would normally or naturally have reached under the economic conditions which obtained generally for such year. The effect of determining "normal earnings" is to *"attribute to the taxpayer in such an event* (e.g. a strike) *the earnings it would normally have experienced had such event not occurred"* (Br. Pet. p. 15a, Committee on Ways and Means, House Report No. 146, 77th Congress, 1st Session, C. B. 1941-1, p. 551). (Emphasis throughout this Reply Brief is supplied by Petitioner).

Thus "normal earnings" for the depression year of 1938 are never raised by section 722 above the depressed level which would have been experienced in the absence of a recognized abnormality (Br. Pet. pp. 43-46). Thus, also, in

the case at bar the correction of earnings for 1937 *results only in the "normal earnings" that would naturally have been experienced if there had been no strike in that year.*

Section 722(b)(2) (Br. Resp. p. 19) corrects only temporary and unusual conditions "in the case of such taxpayer" or its industry, but does not correct the general business depression (Br. Pet. pp. 44, 45, and Bulletin on Section 722, p. 19). Neither is the general business depression corrected under Section 722 (b) (3) which merely brings a low industry business cycle into conformity with the general business cycle, thus leaving the year 1938 at the low level of general business (Bulletin on Section 722, pp. 20, 21, 28, 31, 35, 36—Appendix I).

Average Base Period Net Income.

On the other hand, "average base period net income" is purely a statutory concept for computing excess profits tax liability. It is not a "norm" (Br. Resp. p. 9). The statute uses it as a synonym for "standard of normal earnings," (section 722(b)) and so does Section 7 of E. P. C. 13 (Appendix G). It measures earnings for 1942 which are *not* subject to the tax. The "excess profits net income" specified in section 713, is made "normal" by correcting certain abnormalities under section 711 (b) (1) before such earnings are used for the "average" under section 713 (Br. Pet. pp. 46, 47). The "normal earnings" of section 722(a) are to be used as provided by the definition of "average base period net income" which requires the use of income "for each of the taxable years of the base period."

Purpose of Congress.

The same ambiguous use of words by the respondent (as mentioned under "normal earnings" supra) appears with

respect to the intent of Congress (Br. Resp. pp. 11, 26, 28). If respondent means to argue that Congress intended that "normal earnings" are not the statutory "average," then petitioner's point I is admitted and no further reply is necessary. Respondent, however, infers that the intention of Congress was contrary to this point I and therefore petitioner replies further.

The Committee on Ways and Means "and the Congress, in formulating and enacting that legislation, exercised caution both with respect to *the methods provided for measuring the portion of the corporate earnings to be subjected to the tax* and in alleviating the specific hardships which were disclosed" (Br. Pet. p. 14a, House Report No. 146, 77th Congress, 1st Session, C. B. 1941-1, p. 550).

Thus the "average base period net income" of Section 713, was one of "the methods provided for measuring the portion of the corporate earnings to be subjected to the tax." The general purpose to correct abnormalities in earnings so that they are "normal," before such earnings are used for the statutory average, is shown by Sections 711(b)(1) and 713(c) (Br. Pet. p. 46), and also by the provisions which allow specific relief in addition to the reconstruction of normal earnings (Br. Pet. 47).

When the present general relief provisions were adopted in 1942, Congress reiterated *the same purpose which had motivated the enactment of the 1941 provision,* to use only normal earnings for the computation of the statutory "average" and the credit based on income: "that equitable considerations demand that every reasonable precaution should be taken to prevent unfair application of the excess-profits tax in abnormal cases," and to see that *"income subject to the tax is clearly of the type intended to be reached"* (Br. Pet. pp. 21a, 22a, Committee on Ways and Means,

House Report No. 2333, 77th Congress, 1st Session, C. B. 1942-2, p. 390).

The 1941 enactment of Section 722 by a reference to Section 713 (d) had provided that the reconstructed normal earnings were to be used to compute the statutory average. That reference was no longer necessary in the 1942 enactment since Section 722 now states that taxpayers are "entitled to use" Section 713 without excepting any subsections (Br. Pet. pp. 36, 37). The statute thus confirms the purpose shown by the Committee Reports. The same purpose is further shown because the statute allows relief to a taxpayer "if its *average base period net income* is an inadequate *standard of normal earnings* because—(1) in one or more taxable years in the base period normal . . . operation was interrupted or diminished" (Section 722 (b) (1)).

Correction of Earnings for 1938.

Respondent infers that it is improper for petitioner to seek an adjustment for the year 1938 under section 713(e) after the reconstruction of normal earnings for the year 1937 (Br. Resp. p. 20). In reply an explanation is therefore necessary.

The "standard of normal earnings" prescribed by section 713 (e) is *required* to be used by taxpayers whose base period earnings are *normal* and need no correction under section 722. The statute does *not* provide that it must be "claimed and . . . allowed" (Br. Resp. pp. 9, 16); it is not a mere "possible adjustment" (Id. p. 13) that "so happens" (Id. p. 29). Under section 713 (e) *low normal earnings* for the depression year of 1938 are *required* to be raised to 75% of the average for the other three years for computing the portion of earnings which are not subject to tax liability.

Thus in the case at bar if petitioner had not had a strike in 1937 its earnings for that year would have been normal and the required 75% rule would have operated to give petitioner an average base period net income of $89,539.31. But, because of the strike in 1937, the earnings of petitioner for that year, and also the correction for the depression year of 1938 under the 75% rule, were too low, and in the language of Section 722 (b) "its *average base period net income* is an inadequate *standard of normal earnings.*" The correction for the strike in 1937 reconstructs the "normal earnings" for that year, but unless such "normal earnings" are used as an "average base period net income" there will not be a proper correction of the figure used for 1938. By using *reconstructed* "normal earnings" for 1937, the 75% rule automatically operates to provide a proper correction for 1938, in the same manner as it does for other taxpayers having "normal earnings," and gives petitioner a "standard of normal earnings" amounting to $89,539.31, the same amount as would have resulted if petitioner had had no strike in 1937.

Fair and just amount.

If in the "basic reason" sentence (Br. Resp. p. 29) respondent means to argue that since the words, "fair and just amount," are in the singular number, that "amount" represents a "constructive average base period net income," that argument is contrary to the statutory provision for "a fair and just amount representing normal earnings."

Since the statute requires a separate determination of normal earnings for each year of the base period, and since as a practical matter normal earnings must be determined separately by years (Br. Pet. pp. 44, 45, and E. P. C. 13, Sec. 7, par. (a), Appendix G) the statute clearly provides

"a fair and just amount representing normal earnings" *in each of the years in the base period* (See Title 1, U.S. C., Sec. 1, which provides that "words importing the singular number may extend . . . to several persons or things").

In obscurely arguing that the "average" pursuant to section 713 (e) is not a "fair and just amount," (Br. Resp. p. 11), respondent infers that such average is not just or fair. Since, however, it is the required standard for the tax computation, its fairness is not subject to question here any more than the fairness of the excess profits tax. Petitioner, however, has already made an alternative argument on this point (Br. Pet. pp. 64-68).

Comparison.

In the "basic reason" sentence (Br. Resp. pp. 29, 30, 33) respondent argues that there must be a "comparison between what would be regarded as normal earnings in the base period, as constructed under Section 722 (b) (1), and the actual earnings *in that period.*" This statement is directly contrary to the statutory language of Section 722 (a) providing for a "constructive average base period net income for the purposes of an excess profits tax based upon *a comparison* of normal earnings and earnings *during an excess profits tax period.*" *An excess profits tax period includes the year* 1942 *but not the years of the base period.* Section 713 also makes such a comparison in Section 722(a) by using normal earnings as an "average base period net income." (The respondent's "comparison" argument is answered in Brief for Petitioner, pages 52-56).

Regulations.

Respondent argues that the regulations are reasonable (Br. Resp. p. 11) but offers nothing to substantiate his point other than a vague reference to the statute (Br. Resp.

p. 28) and the opinion of the Tax Court herein which petitioner has shown to be erroneous (Br. Pet. pp. 70, 71).

Petitioner calls the Court's attention to the fact that the original Regulations 112, Section 35, 722(b) (1) (Br. Pet. p. 61), which section had been amended to read as shown at page 57 of Brief for Petitioner, has been amended again while briefs were being prepared in this case, by T. D. 5560, April 16, 1947, to cause the last sentence thereof to read as follows:

> "In a proper case, however, growth may be recognized in arriving at the fair and just amount representing normal earnings if, and to the extent that, such recognition is reasonable and consistent with the conditions and limitations of section 722."

In reality the granting of relief under section 722 has been completed in the case at bar by the determination of constructive normal earnings for 1937, and the determination that earnings are normal for 1936, 1938 and 1939 (Tr. pp. 16, 17), and there is no issue herein respecting the granting of such relief. The ministerial duty to compute the "average" under section 722 is obviously not part of the discretionary duty to determine "normal earnings."

II. Judicial review of a purported computation of the average under section 722 which is contrary to statutory authority, is not precluded by section 732(c).

This proposition follows as a necessary result of the conclusions reached in point I, even though the average be considered to be computed under section 722.

The respondent (Br. Resp. p. 23) cites *Riverside Oil* Co. v. *Hitchcock,* 1903, 190 U. S. 316, 324, 325, 47 L. ed. 1074, 1078, holding: "The court has no general supervisory power over the officers of the Land Department, by which

to control their decisions upon questions *within their jurisdiction.*" But respondent has issued regulations and made purported determinations which reach beyond his jurisdiction under Section 722, and he now asks this Court to close its eyes to such usurpations on the ground that whatever he assumes power to do under that section should not be investigated (Br. Resp. p. 25).

> "No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption." *Waite* v. *Macy,* 1918, 246 U. S. 606, 608, 609, 62 L. ed. 892, 894.

> ". . . but the determination in this case goes so far beyond any possible proper application of the word as to defeat its meaning and to constitute an attempt arbitrarily to disregard the statutory mandate. The rule therefore—that where the adoption of one of several possible interpretations of a doubtful statute involves the exercise of judgment and discretion, upon which the duty of an officer to perform a particular act depends, the courts cannot control the exercise of that discretion—has no application in the present case." *Lukens Steel Co.* v. *Perkins,* 1939, C.C.A. Dist. of Col., 107 F. 2d 627, 630.

The applicable principles are in consonance with recent pronouncements of the Supreme Court of the United States. In *Hirabayashi* v. *United States,* 1943, 320 U. S. 81, 104, 87 L. ed. 1774, 1788, the Supreme Court (affirming a decision of this Court) said:

> "The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. Cf. The *Aurora* v. *United States,* 7 Cranch (U.S.) 382, 3 L. ed. 378; *United States* v. *Chemical Foundation,* 272 U.S. 1, 12, 71 L. ed. 131, 141."

The same principles respecting the delegation of discretionary authority to administrative officers, were reiterated and applied in *Yakus* v. *United States*, 1944, 321 U. S. 414, 424, 425; 88 L. ed. 834, 848; *Bowles* v. *Willingham*, 1944, 321 U. S. 515; 88 L. ed. 903, 904; and *Opp Cotton Mills* v. *Administrator*, 1941, 312 U.S. 126, 145, 85 L. ed. 624, 636.

In the case at bar the basic conclusions of fact to be ascertained are the normal earnings represented by a fair and just amount for each year of the base period. *The computation of the average is not an ascertainment of a basic conclusion of fact.* Upon ascertainment of the normal earnings, the statutory command which becomes operative is that such normal earnings are to be used—not as an average—but as an average base period net income.

Respondent's contention (Br. Resp. p. 23) that "if, as the taxpayer contends (Br. Pet. pp. 75-77), the function of the Commissioner in the circumstances here has been reduced to the performance of a mere ministerial duty, concerning which no determination by him was necessary, it is apparent that the taxpayer's remedy is mandamus to compel the Commissioner to perform such duty," makes the unsupported assumption that a ministerial duty is recognizable only in an action of mandamus.

In numerous cases the Circuit Courts of Appeals have considered and decided cases appealed from the Tax Court under Section 1141 where *a question of statutory computation* was involved. In such cases taxpayers might also have had a remedy by mandamus to compel performance of a purely ministerial duty by the Commissioner. But a concurrent remedy by mandamus has never affected, and cannot affect, the jurisdiction clearly given by Section 1141 to the Circuit Courts of Appeals "to review the decisions of the Board."

A statutory computation such as is involved here, may

be reviewed under Section 1141 without considering whether or not it is properly classified as a ministerial duty. The fact in this case that the computation is a purely ministerial duty is significant only for the purpose of showing that the Commissioner can make no "determination" with respect thereto, the review of which is precluded by Section 732(c) (Br. Pet. pp. 75-77).

Although the quoted statement (Br. Resp. pp. 23, 10) does not deny that the computation of the average is only a purely ministerial duty, we reply to the contrary inference. The computation of the required average in accordance with the statutory definition is clearly a ministerial duty, to the same extent as the computation of interest (*Blair, Commissioner*, v. *Birkenstock,* 1925, C.C.A. Dist. of Col., 6 F. 2d 679, 681) or the allowance of a credit (*Blair, Commissioner* v. *Union Pac. R. Co.,* 1925, C.C.A. Dist. of Col., 6 F. 2d 484, 486; *Kendall* v. *Stokes,* 1838, 12 Peters (37 U.S.) 524, 614, 9 L. ed. 1181, 1216) or the recomputation of a pension at a higher rate in accordance with statutory provisions (*Miller* v. *Black,* 1888, 128 U.S. 40, 52, 32 L. ed. 354, 358).

When an administrative officer has completed the discretionary determination entrusted to him, the remaining duty to carry that determination into effect is purely ministerial. Thus in *United States* v. *Hines,* 1939, C.C.A. Dist. of Col., 103 F. 2d 737, 745, the Court said:

> "The administrator found as a fact that the insured at the time he made the application for reinstatement was in as good health as he was at the due date of the premium in default. . . . Thus the Administrator, having fully exercised his discretion in this respect, and having found that the veteran met the standard required by law, there remains no further discretion to be exercised. There only remains a purely ministerial duty of the Administrator. . ."

Similarly in *Butterworth* v. *Hoe,* 1884, 112 U. S. 50, 68, 28 L. ed. 656, 662, the Supreme Court said:

> "He (the Commissioner of Patents) had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature and to countersign it, were all that remained and they were all purely ministerial."

The ministerial duty prescribed by section 722 does not bestow any power to adjudge, decide or determine (Br. Pet. pp. 75, 76) and there can be no "determination" with respect thereto. Likewise a pretended discretionary determination beyond and outside of the bounds of section 722 is an attempt to adjudge without jurisdiction, and is not a discretionary determination, or any kind of determination whatever. Therefore, an assumed determination which is either contrary to the prescribed ministerial duty, or in defiance of statutory limits of discretion, is not a "determmination" under section 722, the review of which is precluded by section 732 (c).

III. The rights which petitioner asserts relate to section 713, the review of which is not precluded by section 732(c).

The respondent does not deny, and cannot deny, that the computation of the "constructive average base period net income" is part of the computation of the excess profits credit (Tr. 27).

May the Commissioner *disallow* the use of the statutory standard of normal earnings *required for that credit* in Section 713(e)?

May the Commissioner *invent* a lower standard? May the Commissioner thereby *arbitrarily increase the excess profits tax* above the tax payable pursuant to the computation required by law? Petitioner respectfully submits that

a proper construction of Section 713 requires a negative answer to all of these questions, the review of none of which is precluded by section 732 (c).

IV. The Tax Court had jurisdiction of the proceeding.

Respondent argues that section 722 (d) prohibits the application of section 722 and cites several cases which are not applicable to the proceedings in this case.

Section 732(a)

The Tax Court has jurisdiction in this case under section 732 (a). The Commissioner on December 26, 1944, sent the petitioner a notice of disallowance of its application for relief (Tr. p. 7) and within 90 days, on March 24, 1945, a petition for review was filed with the Tax Court (Tr. pp. 1, 12). Nothing else is required by that section to give the Tax Court jurisdiction.

Section 722(d)

Respondent argues that section 722 (d) is involved in determining jurisdiction of the Tax Court. He cites the cases of *Uni-Term Stevedoring Co., Inc.*, v. *Commissioner*, 3 T. C. 917, and *American Coast Line, Inc.*, v. *Commissioner*, C. C. A. 2, 159 F. 2d 665 (on appeal from 6 T. C. 67) which may be considered together. In both cases the Commissioner had not acted on the merits of applications for relief and *had sent no notice of disallowance* whereby the Tax Court could take jurisdiction under section 732 (a).

Both cases involved section 722 (d) before its amendment to its present language. This section formerly allowed an application for relief to be filed directly with the Tax Court in the case of a deficiency. Such was the provision of section 722 (e) enacted by section 6 of the Excess

Profits Tax Amendments of 1941 (26 U. S. C. A., Internal Revenue Acts Beginning 1940, p. 84), which was changed in wording and renumbered section 722 (d) by section 222 of the Revenue Act of 1942 (26 U.S.C.A., Internal Revenue Acts Beginning 1940, p. 299, furnished herewith as Appendix K-2). The privilege of filing an application directly with the Tax Court in the case of a deficiency, was taken away by Act of December 17, 1943, C. 346, 57 Stat. 601 (Id, p. 417) which enacted the present section 722 (d) (Exhibit K-2) applicable beginning after December 31, 1939.

In the above two cases no excess profits tax had been paid. The Tax Court lost jurisdiction in the American Coast Line case after section 722 (d) was amended December 17, 1943.

Ceco Steel Products Corp. v. *Commissioner*, C.C.A. 8, 150 Fed. (2d) 698, and *Pioneer Parachute Company, Inc.* v. *Commissioner*, may also be considered together. In both cases applications had been filed directly with the Tax Court which lost jurisdiction upon amendment of section 722 (d). In both cases the Commissioner had not considered the merits of the application and *had sent no notice of disallowance* to give the Tax Court jurisdiction under section 732 (a).

In *Blum Folding Paper Box Co.* v. *Commissioner*, 4 T. C. 795, the application covered excess profits tax paid. ~~The disallowance was not~~ This case was dismissed on the merits since the taxpayer failed to supply supporting evidence to the Commissioner, and ~~The Tax Court refused to consider the evidence before it had been considered by the Commissioner and disclaimed jurisdiction because original action by that court would not be a review of the Commissioner's determination.~~ the facts stated in the claim, were not adequate for relief.

In *Pohatcong Hosiery Mills, Inc.* v. *Commissioner*, C. C. A. 3, May 23, 1947, — F. 2d —, the Commissioner notified the taxpayer that its applications were prematurely filed,

that they did not constitute claims for refund because the tax had not been paid, and that such notice was not a notice of disallowance. Since there was *no notice of disallowance*, the Tax Court could not take jurisdiction.

In the case at bar the situation is quite different. Here the respondent acted on the merits of the application and sent petitioner a notice of disallowance. While the case was pending in the Tax Court he granted relief for 1937 and found that income of other base period years was normal (Tr. pp. 24, 25). He further stipulated (Tr. p. 19) that if the average is computed as the petitioner contends "the petitioner has overpaid its excess profits tax for said year (1942) in an amount to be determined in accordance with a recomputation of liability under Rule 50 of The Tax Court's Rules of Practice."

There are two reasons why the above cases involving section 722 (d) have no bearing on the situation here presented:

(1.) After the 1943 amendment of section 722 (d), the only requisites for jurisdiction of the Tax Court are the notice of disallowance and the timely petition to the Tax Court. "Such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayment." (section 732 (a)—Appendix K-1). In the case of a notice of deficiency, only the notice and timely appeal are requisite to jurisdiction. The similarity of language of section 732 (a) to section 272 (a) shows that nothing more was intended for jurisdiction to review applications for relief. The Tax Court did not consider more than these two requisites for jurisdiction in *Lamar Creamery Co., Inc.,* v. *Commissioner,* 1947, 8 T. C. ...., No. 107.

(2.) Procedural questions relating to the sufficiency of

the application for relief as a claim for refund, should have been raised by the Commissioner in the Tax Court. His action on the merits was a waiver of any irregularities (*Tucker* v. *Alexander*, 1927, 275 U. S. 228, 231, 72 L. ed. 253, 256), including payment if made after filing claim for refund* and was presumptive proof of all acts necessary to make that action legally operative (*R. H. Stearns Co.* v. *United States*, 1934, 291 U. S. 54, 63, 78 L. ed. 647, 653). If he had found that payment had not been made before the claim was filed, he would have sent petitioner the type of notice he sent in *Pohatcong Hosiery Mills, Inc.*, supra. Instead, the Commissioner sent a notice of disallowance of the claim and thus determined that the claim had met the requirements of section 722 (d). The Commissioner failed to raise any objection in the Tax Court. In the Tax Court he did not deny that his determination was correct. *No other tribunal can review that determination.* Review in this Court and elsewhere is prohibited by section 732 (c).

The Commissioner stipulated that the tax was overpaid, if the average is computed as petitioner claims it should be, and the Tax Court adopted the stipulation as a finding of fact (Tr. p. 27). It was a finding that the petitioner would recover something—that the claim met the requirements of section 722 (d)—a determination that the tax had been paid before the claim was filed. It was a determination of a question of fact necessary solely by reason of section 722, of which section 722 (d) is a part. It was not a question of law involving a ministerial duty, as is the computation of the "average." Review of such a fact determination in this Court is precluded by section 732 (c).

The record shows that the amount of the deficiency, $2,106.08, was paid after the application for relief was filed. *Some tax had been paid*, and that was the only requirement as a basis for relief (*Uni-Term Stevedoring Co.* v. *Commissioner*, 3 T. C. 917, 919). Regulations 112, Sec.

* (Continental Bank v. U.S., Ct. Cl. 1941, 39 Fed. Sup. 610, 613)

35.722-5(c) provides: "The amount of credit or refund claimed shall be the excess of the amount of excess profits tax for the taxable year paid over the amount of excess profits tax claimed to be payable computed pursuant to the provisions of section 722." From the record the amount of overpayment can be computed as $5,759.70 subject to adjustment for the 10% post-war credit (Br. Pet. p. 15), and therefore from any standpoint an overpayment of approximately $3,000 results even though the amount of the deficiency be excluded from the computation.

The Tax Court, therefore, clearly had jurisdiction under section 732 (a).

Section 272(a)

Respondent (Br. Resp. p. 2, footnote) also attacks the jurisdiction of the Tax Court under section 272(a) (Appendix L). Regardless of dictum in various cases to the contrary, petitioner submits that the Tax Court also had jurisdiction under section 272(a). The timely appeal from a notice of deficiency is clear (Tr. pp. 3, 4). Nothing else was required for jurisdiction. The agreement of the parties could neither give jurisdiction, nor change it to some other section (Cf. *Mitchell* v. *Maurer,* 1934, 293 U. S. 237, 244, 79 L. ed. 338, 343). It remained pursuant to section 272(a). Findings of overpayments and refunds were therefore prohibited unless found by the Tax Court in that proceeding, as provided by section 322(c) and (d) (Appendix M). Cf. *De Sabichi* v. *Commissioner,* 1926, 4 B. T. A. 445, 447.

Any question as to whether in connection with the filing of the application for relief, all requisite steps were taken for the allowance of a refund, is not a jurisdictional question under section 272(a).

The Tax Court therefore also had jurisdiction of this case pursuant to sections 272(a) and 322(c) and (d).

Conclusion.

In view of the foregoing and in view of the reasons presented in the Brief for Petitioner, it is submitted that the decision of the Tax Court should be reversed with directions to compute the constructive average base period net income in the manner provided by section 713(e) of the Internal Revenue Code.

Respectfully submitted,

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June, 1947.

APPENDIX G.

Excerpts from E. P. C. 13, issued by the Excess Profits Tax Council, April 9, 1947, and published in Internal Revenue Bulletin No. 9, for May 5, 1947, pp. 18-23.

The recognition of fluctuation, abnormal variation, and growth in the determination of constructive average base period net income.

* * * *

5. As used in this connection:

(a) *Fluctuation* refers to variations, in the income, expense, or net earnings experience of a business or industry, of a character or magnitude which ordinarily would be expected to occur within the interval selected as the base period.

* * * *

7. *Fluctuation cases.*—By definition, the recognition of fluctuation precludes the application of methods whereby greater weight is given to experience during one part of the base period than to the experience during another. The objective is the selection of a method which will give recognition to the ordinary fluctuation which would be expected to characterize the taxpayer's experience during the base period. Accordingly, in converting constructive annual earnings for the several base period years (or for one year when appropriate) to constructive average base period net income, the following methods will be acceptable:

(a) When earnings for each year of the base period have been constructively determined, the standard of normal earnings should be determined by the use of the arithmetic average of such earnings.

* * * *

9. *Growth cases.*—The objective of methods recognizing growth is to correct the taxpayer's experience for the effects of changes during the base period in business conditions or in the character of the taxpayer's business activities which, by the end of the base period, resulted in a relatively permanent increase in the taxpayer's level of earnings.

* * * *

(c) When the comparative experience or the index, used in reconstructing the three earlier base period years, itself typifies growing business experience, correction for the growth factor will not be fully completed in the yearly reconstruction. In such cases, full recognition of growth may be accomplished by determining the taxpayer's normal earnings level through the use of any accepted statistical method including the growth formula. The amount so determined shall, in no case, be greater than the highest amount of constructive earnings for any year of the base period.

* * *

CHARLES D. HAMEL,
Chairman, Excess Profits Tax Council.

April 9, 1947.

APPENDIX H.

Definition of "Normal".

(Webster's New International Dictionary,
Second Edition, Unabridged.)

Normal * * *

2. According to, constituting, or not deviating from, an established norm, rule, or principle; conformed to a

type, standard, or regular form; performing the proper functions; not abnormal; regular; natural; analogical.

* * * *

5. *Econ.* Pertaining or conforming to a more or less permanent standard, deviations from which, on either side, on the part of the individual phenomena are to be regarded as self-corrective. Thus, the *normal price* is a price which corresponds to the cost of production. In economics, *natural* and *normal* are sometimes used as synonymous; but *natural* involves certain assumptions not connoted by *normal.*

* * * *

Syn. and Ant.—See Regular.

Regular * * *

Syn.— . . . Regular, Normal, Typical. That is *regular* (opposed to irregular), as here compared, which conforms to an established or prescribed rule or standard; *normal* (opposed to abnormal) is more limited and exact in its application, and implies strict accordance with what is to be expected if regular processes are followed or proper functions performed; as, to apply the *regular* tests, his actions are not those of a wholly *normal* person; a *regular* verb; his temperature is *normal.*

APPENDIX I.

Excerpts from
Bulletin on Section 722 of the
Internal Revenue Code
November 1944
Washington, D. C.

PART IV.

Variant Profits Cycle and Sporadic Profits Experience.

* * * *

Page 20.

Under section 722(b)(3)(A) the taxpayer must demonstrate that the industry of which it is a member normally experiences a cyclical pattern of profits of such a character that the average profits realized by the industry during the statutory base period differed markedly from the profits experience of business generally, and therefore is not a fair representation of the taxpayer's normal profits. Under section 722 (b)(3)(B), the taxpayer must show that its industry characteristically has a profits behavior involving isolated periods of high production and profits occurring at irregular intervals, and that such periods were not represented, or were inadequately represented, in the statutory base period. Inadequate representation of such periods occurs when either their frequency or extent during the base period was less than is, on the average, normally encountered.

* * * *

Page 21.

The manner in which *prior experience should be used as a guide* in the determination of normal earnings in a section 722(b)(3) case will be discussed below in the sections on reconstruction.

* * * *

Page 27.

(C) Variant Profits Cycle-Reconstruction.

* * * *

Page 28.

Wherever in the following description reference is made to average base period net income the term means the simple arithmetic average of the annual incomes, deficits

included, rather than the statutory average base period net income as defined in section 713, which may reflect the application of the growth formula, deficit rule, or 75 per cent rule.

* * * *

Page 31.

(8) The final step in reconstruction is to adjust the average base period net income of the taxpayer to the normal base period level by applying the ratio found in step (7), which ratio represents the degree of the taxpayer's cyclical depression.

* * * *

Page 35.

(E) Sporadic Profits Experience-Reconstruction.

(1) Having determined that the taxpayer has met the test of demonstrating that its production and profits experience, together with that of its industry, is characterized by sporadic and intermittent periods of high production and profits, the next step is to determine whether such periods are inadequately represented in the base period years, and, if so, to reconstruct the normal earnings of the taxpayer. The computation to determine the constructive average base period net income will answer both of these requirements.

Having determined the length of the extended period to be considered, as discussed above, there are at least two methods for computing the constructive average base period net income. Wherever in the following discussions reference is made to average base period net income, the term means the simple arithmetic average of the annual incomes, deficits included, rather than the statutory average base period net income as defined in section 713, which

may reflect the application of the growth formula, deficit rule, or 75 per cent rule.

(2) The first method, as suggested by the regulations, is to proceed exactly as in the case of a variant profits cycle case as discussed in section (C) herein. Since the essential nature of the depression of the base period net income is the same in both cases, namely, that the base period is unrepresentative of the normal experience of the taxpayer, the reconstruction can proceed along similar lines.

APPENDIX K-1.

Section 732(a)
Internal Revenue Code
(26 U.S.C.A. 1945 ed. section 732(a))

Review of abnormalities by Board of Tax Appeals—(a) Petition to the Board

If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711(b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayment.

APPENDIX K-2.

Former Provision of Section 722(d)
Section 722(d)—as amended by Section 222 of the Revenue Act of 1942
(26 U.S.C.A. Internal Revenue Acts Beginning 1940, pp. 299, 300)

"(d) Application for relief under this section. The taxpayer shall compute its tax, file its return, and pay its tax under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer, not later than six months after the date prescribed by law for the filing of its return, or if the application relates to a taxable year beginning after December 31, 1939, but not beginning after December 31, 1941, within six months after the date of the enactment of the Revenue Act of 1942, makes application therefor in accordance with regulations to be prescribed by the Commissioner with the approval of the Secretary, except that if the Commissioner in the case of any taxpayer with respect to the tax liability of any taxable year—

"(1) issues a preliminary notice proposing a deficiency in the tax imposed by this subchapter such taxpayer may, within ninety days after the date of such notice make such application, or

"(2) mails a notice of deficiency (A) without having previously issued a preliminary notice thereof or (B) within ninety days after the date of such preliminary notice, such taxpayer may claim the benefits of this section in its petition to the Board or in an amended petition in accordance with the rules of the Board.

If the application is not filed within six months after the date prescribed by law for the filing of the return, or if

the application relates to a taxable year beginning after December 31, 1939, but not beginning after December 31, 1941, within six months after the date of the enactment of the Revenue Act of 1942, the operation of this section shall not reduce the tax otherwise determined under this subchapter by an amount in excess of the amount of the deficiency finally determined under this subchapter without the application of this section. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

Present Provision of Section 722(d)
As amended by Act of December 17, 1943, C. 346, 57 Stat. 601 (26 U.S.C.A. 1945 ed. Sec. 722(d))
(26 U.S.C.A. Internal Revenue Acts Beginning 1940, p. 417)

(a) Section 722 (d) of the Internal Revenue Code (prescribing the time for filing applications for general relief under the excess-profits tax) is amended to read as follows:

"(d) Application for Relief Under This Section. The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the

Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year."

(b) The amendments made by subsection (a) shall be applicable with respect to taxable years beginning after December 31, 1939.

APPENDIX L.

Excerpts from Section 272 Internal Revenue Code (26 U.S.C.A. 1945 Edition Sec. 272(a)(1))

(a) (1) Petition to Board of Tax Appeals. If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. . . .

(d) Waiver of restrictions. The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

APPENDIX M.

Excerpts from Section 322 Internal Revenue Code (26 U.S.C.A. 1945 Edition Sec. 322)

(a) Authorization

(1) Overpayment. Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * *

(b) Limitation on allowance

(1) Period of limitation. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * *

(c) Effect of petition to Board. If the Commissioner

has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

* * * *

(d) Overpayment found by Board. If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. . . .

* * * *

No. 11548

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STIMSON MILL COMPANY,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

Petition for Rehearing.

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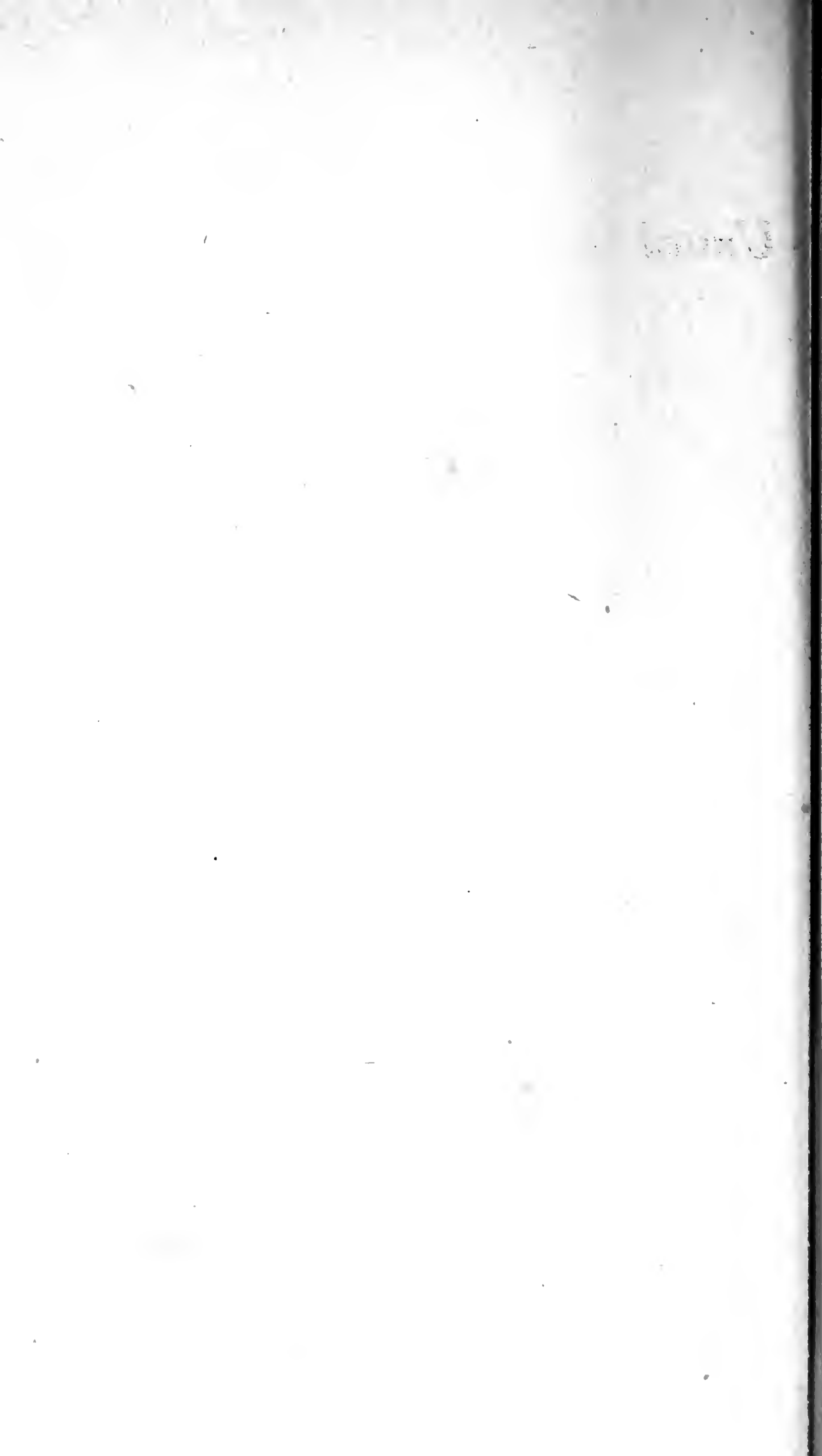

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11548

STIMSON MILL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

We respectfully urge that the Court reached its decision through a misapprehension of the effect of the "in lieu of" clause in the 1942 amendments of section 722 which in substance was not new but replaced a parallel clause of similar effect in the 1941 enactment—a clause which substituted the constructive average for the average under section 713 (e) but did not affect the statutory requirement of the 1941 enactment that the constructive average should be computed "in the same manner" as the average in section 713 (e).

We respectfully submit that the Court has misapprehended the significance and effect of the words, "a fair and just amount," and of our arguments regarding those words and regarding other statutory provisions.[1]

Pohatcong Hosiery Mills, Inc. v. *C. I. R.*, CCA 3, decided May 23, 1947, is cited by the Court on propositions of law with which we agree, but we feel that we should call the Court's attention to the fact, which the Court may have overlooked, that no claim for refund was before the Court in the *Pohatcong* case to form the basis of a decision regarding procedure to be followed for the realization of relief on such a claim. On the second page of the opinion in the *Pohatcong* case, italicized language, referred to on oral

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[1] Although the Brief for the Respondent herein was directed only to the jurisdiction question and not to the merits question, nevertheless Counsel for the Commissioner, on oral argument based on the Brief for the Respondent, in answer to a question asked by Honorable Judge Stephens, admitted that he was also arguing the merits. Under such circumstances we respectfully submit that the Reply Brief for Petitioner which was directed to the points made in the Brief for the Respondent, should also be considered as a reply on the merits as well as on the jurisdiction question. Since we did not know at the time we wrote the reply brief that the Commissioner was also arguing the merits, we of course were not able to reply fully with respect to the merits in the reply brief. But the questions both on the jurisdiction and on the merits involved many of the same problems of statutory construction, and our reply brief to some extent replies on the merits. This is true particularly of the interpretation to be given the words, "a fair and just amount representing normal earnings to be used as a constructive average base period net income," which were argued in the Brief for the Respondent. We respectfully submit that our position on questions of statutory interpretation must necessarily be the same whether directed to the jurisdiction or to the merits, and that in view of the fact that the Commissioner's arguments were on the merits as well as on the jurisdiction, the Reply Brief for Petitioner should be taken as a reply on the merits as well as on jurisdiction.

argument, shows the determination of the Commissioner, pursuant to section 722 (d), that "these applications do not constitute claims for refund," and the Court in that case does not show that section 732 (c) does not preclude review of the Commissioner's determination. The *Pohatcong* case, however, is not involved in this Petition for Rehearing.

We realize that it is not the purpose of a petition for rehearing to reargue the case and accordingly we will attempt to limit ourselves to pointing out the following specific points in the briefs which we believe the Court has overlooked and which we respectfully submit are inconsistent with the decision reached by the Court.

I.

The Court has overlooked the fact, argued by petitioner, that the "in lieu of" clause in the 1942 amendments of section 722 merely replaced a clause of similar meaning in the 1941 Act and did not change the requirements of the 1941 enactment that constructive average base period net income be computed in the same manner as provided by section 713 (e). A comparison of these parallel provisions of the two enactments was made at page 39 of the Brief for Petitioner where it was shown that section 722(a) of the 1941 Act concludes by stating:

> ". . . the amount established under paragraph (3)" (namely the constructive average) "shall be considered as the average base period net income of the taxpayer for the purposes of this subchapter."

The "in lieu of" clause of the 1942 Act, and the parallel provision of the 1941 Act, both require substitution of the constructive average base period net income in lieu of the average computed under section 713 (e). In substance the "in lieu of" clause of the 1942 Act was not an alteration of the 1941 Act.

The court misapprehended point IV of the Brief for Petitioner, pp. 38-40. The "in lieu of" clause was explained in conjunction with the provision of the 1942 Act that normal earnings be used "as" a constructive *average base period net income* which is parallel in effect to the provision in section 722 (b) (3) of the 1941 Act that the reconstructed earnings be computed "in the same manner as provided in" section 713 (e). The fact is that under both Acts the manner of computation of the average for constructive normal earnings was the same as provided by section 713 (e), even though such constructive average base period net income was to be used in both Acts in lieu of the average otherwise determined under section 713 (e).

The Court at page 11 of its opinion states: "The constructive average of § 722 is to be used in lieu of the § 713 (e) (1) average; hence it cannot be the same average as that called for in § 713 (e) (1)." It is respectfully submitted that Petitioner has never intended to argue and has not argued to the contrary. The average in section 722 must be substituted for the average in section 713 (e). But the average in section 722 is a constructive "average base period net income" which is defined in section 713 (e). It is not an average base period constructive net income, or an arithmetic average, or anything other than a constructive *average base period net income.* When the method of computation prescribed by the definition of average base period net income in section 713 (e) is applied to recon-

structed earnings, the amount resulting is *not* the same average prescribed by that section; the result is a constructive average base period net income, which, in view of the parallel provisions of the 1941 enactment, is the result which the 1942 statute intended.

II.

The Court has disregarded the fact that the committee reports on the 1942 Act repeated the same legislative purpose which had been the aim of Congress in the 1941 enact-ment of section 722. The Court's attention is respectfully called to the quotation from the committee reports on page 35 of the Brief for Petitioner where the equitable considerations which motivated the 1941 enactment were emphasized in view of the increase in tax rates in 1942 and "the need for expanding the application of the relief section". The fact that the same legislative purpose motivated both enactments was also called to the Court's attention at page 6 of the Reply Brief for Petitioner.

III.

The Court has overlooked the fact that subsection (c) taken with subsection (b) of section 722, shows that a taxpayer is "entitled to use" section 713 and its subsections after qualifying for relief, such fact being one of the grounds for petitioner's argument that "constructive average base period net income" should be construed with the definition in section 713 (e). *Bickford* ("Excess Profits Tax Relief", pp. 21, 22; 1944; Prentice-Hall) does not mention the fact shown by petitioner that under section 722 (c) corporations not entitled to use section 713, become entitled to use section 713 after they qualify for relief under section 722 (Br. Pet. pp. 32, 33).

Petitioner's argument that sections 722 and 713 "must accordingly be construed together" (Br. Pet. p. 33) does not conflict with the fact that the constructive average must be used in lieu of the average in section 713 (e). (In the Reply Brief we pointed out the confusing use of terms by the respondent, but it now appears that we inadvertently have also been at fault.) Throughout the brief the method of construing the sections together is indicated; the constructive average base period net income must be computed "in the same manner" as provided in section 713 (e) or "in accordance with" section 713 (e) (Br. Pet. pp. 3, 16, 23, 24, 33, 38, 39, 53, 56, 60, 67, 73). "The 'normal earnings' of section 722 (a) are to be used as provided by the definition of 'average base period net income' " (Rep. Br. Pet. p. 5).

IV.

The Court has overlooked the fact that the computation of the constructive average is only a purely ministerial duty and that such ministerial duty renders untenable the Commissioner's regulations that "The constructive average base period net income is a fair and just amount representing normal earnings".

At page 13 of the Reply Brief for Petitioner it was shown that the Commissioner's evasive answer (Br. Resp. pp. 23, 10) "does not deny that the computation of the average is only a purely ministerial duty." The Commissioner's regulations that the "constructive average . . . is a fair and just amount", do not recognize the fact that the computation of the average is a ministerial duty. The words, "fair and just amount", are words of discretion. The computation of the average is not discretionary (Cf. Br. Pet. pp. 57-59).

It is respectfully submitted that the Court misapprehended these facts in stating at page 7 of the opinion: "On the other hand 'constructive average base period net income' is established by the *discretionary* use of rules and methods....". (Emphasis was supplied by the Court.)

V.

The Court at page 8 of its opinion considers petitioner's alternative point "that there is no evidence that an average computed under §713 (e) (1) is *not* a fair and just amount." But in so doing it is respectfully submitted that the Court has overlooked other arguments of petitioner, respecting the meaning of "a fair and just amount", as follows:

1. The statute provides for "a fair and just amount representing *normal earnings*" and not a fair and just amount representing a *constructive average* (Br. Pet. p. 38; Rep. Br. Pet. p. 1 et seq.)

2. "A fair and just amount" represents "normal earnings", and "normal earnings" are not an average (Rep. Br. Pet. pp. 4, 5, 8, 9).

3. The Commissioner's discretion ends with the determination of a fair and just amount representing normal earnings, and the computation of the average, whether an ordinary arithmetic average or the average in accordance with section 713 (e), is only a ministerial duty concerning which the Commissioner has no discretion (Br. Pet. pp. 75-77; Rep. Br. Pet. pp. 10-14, particularly page 13). The words, "a fair and just amount", are words of discretion, but they do not permit any deviation from the computation which is a ministerial duty prescribed by statute (Br. Pet. pp. 75-77; Rep. Br. Pet. p. 12.)

4. The computation prescribed by section 713 (e) can-

not be tested as to whether it is a fair and just amount because it is a "standard of normal earnings", which, while based on normal earnings, is an automatic formula entering into the computation of the tax. A substituted constructive standard of normal earnings pursuant to section 722 (a) produces an erroneous tax computation if it does not conform to the prescribed standard (Br. Pet. pp. 42, 43, top of p. 68, 73; Rep. Br. Pet. pp. 7-9). The fairness of the required standard for the tax computation "is not subject to question here any more than the fairness of the excess profits tax" (Rep. Br. Pet. p. 9).

VI.

The Court has overlooked the fact that the automatic raising of earnings for the year 1938 is a result of the method prescribed by section 713 (e) for the computation of the tax. If petitioner had had no strike in 1937 its average base period net income as a matter of fact would have been $89,539.31. After correction of the 1937 earnings under section 722 to what they would have been in the absence of a strike, the automatic increase of the year 1938 is also properly corrected when the constructive average is computed in accordance with the method prescribed by section 713 (e) and the resulting constructive average of $89,539.31 produces the equitable result of relieving the petitioner from the abnormal results of the strike. The need of making the automatic correction for the year 1938 was shown at pages 7 and 8 of the Reply Brief for Petitioner.

Section 722 (b) (1) states that normal earnings may be redetermined for one year. But if the automatic method of computing the tax prescribed by the definition in section 713 (e) is not followed, the relief statute is construed to deprive the petitioner of relief (Br. Pet. pp. 15, 16, 52-56).

VII.

In stating at page 6 of the opinion that "By stipulation he established the right to raise the 1937 figures under § 722, and by stipulation he was not entitled to raise other years under that section'', the Court overlooks the principle that parties may stipulate only as to facts and not as to the legal effect to be given such facts (*Sanford's Estate* v. *C. I. R.*, 1939, 308 U. S. 39, 51, 84 L. ed. 20, 26).

VIII.

The fact that the relief provisions of section 722 represent sovereign gracious clemency on the part of Congress, is recognition of the remedial nature of such provisions. It is respectfully urged that in this situation the application of the principle of liberal construction has been overlooked by the Court. The application of that principle was argued at pages 50 and 51 of the Brief for Petitioner. The quotation at page 51 from *Bonwit Teller & Co.* v. *United States,* 1931, 283 U. S. 258, 263, 75 L. ed. 1018, 1021, that a relief provision in a tax law "is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide'', is supported by ample authority cited by the Supreme Court.

The Court at page 11 of the opinion herein states:

> "Fourth: Taxpayer argues that since it has established both conditions precedent for the use of § 722, the tax must be determined by the constructive average. With this we agree."

May we submit that if the principle of liberal construction be here applied, would not the constructive average be computed in accordance with the method prescribed by

section 713 (e) in order that the statute may give the relief it was intended to provide?

Respectfully submitted,

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August, 1947.

No. 11,549

In the

United States Circuit Court of Appeals

For the Ninth Circuit

TANFORAN COMPANY, LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

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FILED

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LAHUE, NORRIS & BENNETT, SAN JOSE

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Whether or not the judgment in the condemnation suit was satisfied is a matter to be determined upon the evidence and not from the facts stated in appellant's complaint. On a motion to diismiss, every contendment must be taken in favor of the sufficiency of the complaint, and if any relief whatever was possible the cause should have gone to trial 4

The settlement agreement did not effect a release or waiver of the right of Tanforan Company to restore its property as provided for in the final judgment and did not constitute a satisfaction of said judgment 10

Assuming that the restoration agreement was, in effect, a satisfaction of judgment, the facts pleaded by appellant in its complaint would justify the setting aside of such satisfaction for want or failure of consideration or for mistake or for nonperformance of a condition 17

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No. 11,549

In the

United States Circuit Court of Appeals

For the Ninth Circuit

TANFORAN COMPANY, LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

The appellant, Tanforan Company Ltd., respectfully prays for a rehearing of this cause on the ground that the opinion of the Circuit Court entirely overlooks the undisputed, uncontradicted and admitted facts pleaded in appellant's complaint in the Court below. The decision of this Honorable Court in effect holds that the restoration agreement entered into by Tanforan with the government constituted a satisfaction of judgment, notwithstanding allegations to the effect that the parties never intended it as a satisfaction of judgment; notwithstanding allegations that there was a failure or want of consideration therefor; notwithstanding allegations that said contract was entered into under mutual mistake of fact or of law; or notwithstanding allegations that said contract was entered into upon certain conditions which were not fulfilled.

The decision of this Honorable Court overlooks the fact that the Court below granted the government's motion to dismiss upon admittedly erroneous grounds and not upon the ground that the agreement constituted a satisfaction of the judgment.

The opinion of this Honorable Court fails to distinguish between a release of the government's *obligation* to restore the premises, and the *right* of Tanforan to restore its premises as a part of the consideration awarded it in the condemnation decree, which compensation cannot be modified or diminished by the legislative or administrative branches of the government.

If we were to assume, without conceding, that the restoration agreement operated as a satisfaction of the judgment, such a determination would not be decisive and the opinion of this Honorable Court fails to take into consideration that facts were pleaded in Tanforan's complaint which justified equitable relief from the effect of such a satisfaction of judgment, which facts, upon a motion to dismiss, must be assumed to be true. The issue presented by this appeal is not merely whether the agreement constituted a waiver of Tanforan's right of restoration, but also whether the pleaded facts would justify *relief from the effect of the agreement* even if it did constitute a satisfaction of the judgment.

In arriving at its decision this Honorable Court determined questions of fact. In its decision on matters of law this Honorable Court entirely disregarded the authorities in support of the legal questions presented by this appeal. A rehearing is sought in order that erroneous conclusions of law enunciated by the decision of this Honorable Court may be corrected and a miscarriage of justice averted.

WHETHER OR NOT THE JUDGMENT IN THE CONDEMNATION SUIT WAS SATISFIED IS A MATTER TO BE DETERMINED UPON THE EVIDENCE AND NOT FROM THE FACTS STATED IN APPELLANT'S COMPLAINT. ON A MOTION TO DISMISS, EVERY CONTENDMENT MUST BE TAKEN IN FAVOR OF THE SUFFICIENCY OF THE COMPLAINT, AND IF ANY RELIEF WHATEVER WAS POSSIBLE THE CAUSE SHOULD HAVE GONE TO TRIAL.

This is an appeal from an order granting appellee's motion to dismiss the ancillary and supplemental bill in equity filed below by Tanforan to prevent interference with the enforcement of the judgment of the District Court. While the government moved for a dismissal on the ground that the action had been concluded, and the judgment therein had been satisfied by agreement of the parties, the Court below granted the motion to dismiss on procedural grounds not raised by the appellee. The decision of this Honorable Court is to the effect that the restoration agreement constituted a satisfaction of the judgment. The pleadings of Tanforan set forth facts which are not disputed nor controverted by the government. The undenied allegations are that the restoration agreement did not constitute a satisfaction of the judgment and that the parties never intended that the judgment be satisfied insofar as the right of Tanforan to restore its premises were concerned. Upon a motion to dismiss, the allegations of appellant's pleadings must be deemed true. Under the allegations of appellant's pleadings appellant was entitled to the

equitable relief sought, regardless of the wording of the agreement between the parties.

A motion to dismiss is in the nature of a demurrer and assumes the truth of the allegations. If it is true, as alleged by Tanforan, that the restoration agreement was not a full satisfaction of the judgment (T. R., p. 42), that the whole purpose of the settlement was to shift the burden of expense for the performance of the work of restoring the premises from the United States to the Tanforan Company, Ltd., and *it was always well understood by the parties to the agreement that the Tanforan Company, Ltd., was asserting and would continue to assert its rights under the terms of the judgment entered in the above-entitled action* to proceed with and to perform and complete the work of restoration (T. R., p. 40), and that the settlement agreement was signed and executed by the Tanforan Company, Ltd., *upon the understanding and assurance that nothing contained therein would interfere with or obstruct its right to continue the work of restoring its property and in putting its premises in condition so that they could be used profitably and produce an income.* (T. R., p. 41), and if the other allegations contained in the complaint and affidavit of Guy M. Standifer (T. R., p. 38) are true, (and for the purpose of the motion to dismiss they must be taken as true) then it can not be said that the restoration agreement effected a satisfaction of the judgment. Such a holding is diametrically opposed to the allegations of appellant's complaint (admittedly true).

In granting the motion to dismiss, the Court below precluded proof of the facts alleged, which facts, if proven, would entitle the appellant to the relief sought. The Court below did not decide, as did this Honorable Court, that the restoration agreement constituted a satisfaction of the judgment. It granted the motion to dismiss on the ground that the procedure adopted by the appellant was improper. The memorandum opinion and order dismissing appellant's application says:

> "It seems hardly necessary to point out that this so-called application is, in truth, a complaint in equity in which Tanforan Company, Ltd., is the plaintiff and the United States, its Civilian Production Administration and officers, agents and employees thereof, are defendants. It is wholly unrelated, in substance, to the case of *United States v. Certain Lands, etc.* An allegation in the complaint that the Order of the Civilian Production Administration was 'in contemptuous willful disregard of the judgment and order of this Court' is the pleader's erroneous conclusion, which is refuted by the obvious fact that Tanforan Company, Ltd., the real plaintiff herein, *predicates its prayer for relief solely on the alleged agreement which was entered into approximately one year after the judgment was entered.* Further discussion would be superfluous." (Italics ours).

It seems clear that the Court below believed that the relief sought should have been set up in an independent suit in equity and that Tanforan's complaint was unrelated to the condemnation suit. *The appellant did not predicate its prayer for relief on the alleged agreement as stated in the opinion of the lower Court.*

It clearly and unequivocably based its prayer for relief *upon the judgment in the condemnation suit.* It set up the agreement in its pleading simply to place all the facts before the Court and alleged facts which are sufficient to justify a holding that the restoration agreement did not constitute a satisfaction of the judgment, nor bar relief to the appellant under the judgment.

It is apparent from the opinion of the Court below that the Court believed that Tanforan's application was a complaint in equity in which Tanforan Company, Ltd., was the plaintiff and the United States and its agencies the defendants. The trial Court must have believed that a cause of action was stated but that it had no proper place in the principal condemnation action. We respectfully submit, under the authorities cited herein, that it had a proper place in the condemnation action and that an independent suit was not necessary. That being true, upon a motion to dismiss, every intendment must be taken in favor of the complaint, and if any relief whatever was possible the cause should have gone to trial.

As stated in *Martin v. Brown*, 294 F. 441:

> "It is unnecessary to do more than generalize upon the intendment of the bill. It may very well be that the charges made cannot and will not be substantiated; that it may develop, upon hearing, that complainants are estopped from being accorded the relief in whole or in part to which they lay claim; but this Court cannot anticipate such a result, particularly when the trial Court upon the face of its ruling concedes that a case is stated against some of the defendants, when such finding is sustained by the allegations of the

> bill, and when it appears that all of the defendants are at least proper, if not necessary, parties to a determination of the full extent of the relief which may flow from the cause of action stated."

The case of *Duell v. Brewer*, 92 F. (2d) 59, involved an appeal from a decree in equity dismissing a bill for insufficiency upon its face. The Court held that every intendment must be taken in its favor, and if any relief whatever was possible, the cause should have gone to trial, and the Court reversed the decree of dismissal and remanded the cause.

In *Rectangle Ranche Co., v. Board of Commissioners*, 96 F. (2d) 825, the Court said:

> "From the briefs of appellee here and from the proceedings below it is quite plain that the petition was dismissed not because of the view that it failed to state a cause of action, but because of the insistence of the motion and in the argument in support of it that the deed to Rose made before the suit was filed had rendered the controversy moot.
>
> "We agree with appellant that the effect of this ruling was to determine the merits against it, not after a hearing, but upon preliminary motion. As the plaintiff's bill stood, it presented a real controversy within the jurisdiction of the Court, the determination of which required a hearing on the merits, or at least a determination of whether there was equity in the bill. The motion the Court sustained was a motion to dismiss, not for want of equity in the bill, but for want of jurisdiction. None of the matters presented in the motion went to or affected the Court's jurisdiction. It was error to sustain it.
>
> "It will not do, as appellee argues, to urge upon us that the bill ought to have been and was dismissed for want of equity. It is perfectly clear that it was not. On its face the order in terms

> declares that the bill was dismissed because the motion of April 20, 1937, to dismiss for want of jurisdiction, was sustained.
>
> "We do not decide, the matter is not properly before us for decision, whether, if the matters relied on by defendant were all set out in the bill, a cause of action in equity would be stated. We merely decide that it was error to dismiss the bill for want of jurisdiction, and we remand the cause for further and not inconsistent proceedings. We make no direction as to, or limitation upon, the further action of the Court, except that the case may not be dismissed for want of jurisdiction, but must be retained to be determined on its merits as they appear from the bill and the proofs, if any, offered in its support."

In *J. Dreher Corporation v. Delco Appliance Corporation*, 93 F. (2d) 275, the Court held that whether a contract was definite enough to be enforced would not be determined on appeal from a judgment dismissing the complaint for insufficiency on its face in an action brought for the breach of such contract since that was not a defect which could be reached by challenge to the pleadings.

In the case at bar the effect of the lower Court's ruling is to determine the merits of Tanforan's application against Tanforan, not after a *hearing*, but upon a *preliminary motion to dismiss*. Such a ruling and such a result should not be permitted by this Honorable Court and a rehearing should be granted to correct this error.

THE SETTLEMENT AGREEMENT DID NOT EFFECT A RELEASE OR WAIVER OF THE RIGHT OF TANFORAN COMPANY TO RESTORE ITS PROPERTY AS PROVIDED FOR IN THE FINAL JUDGMENT AND DID NOT CONSTITUTE A SATISFACTION OF SAID JUDGMENT.

The allegations of the undenied ancillary bill filed by Tanforan would support a finding that the agreement did not constitute a satisfaction of the judgment. We have completely discussed in appellant's opening brief the proposition that appellant's right to restore its property was a part of the consideration awarded to it in the main case for the taking thereof and that its right to this compensation is protected both by the judgment and the Fifth Amendment. The *right* of appellant to restore its property must be distinguished from the *obligation* imposed upon the United States to pay for the expense of doing the work of restoration. The burden of this expense was an *obligation* imposed upon the United States, which is separate and distinct from the *right* of restoration which was awarded to the Tanforan Company. The release in the instant case does no more than to witness the full satisfaction "of the obligation of the government to restore" appellant's property and to "remise, release and forever discharge the government, its officers, agents and employees, from any and all manner of actions, liabilities and claims *against the government*, its officers, agents and employees, for the restoration of said property, etc."

These words purport to do nothing more than to relieve the government of its *obligations* and to release it from any claims *against it* which might arise out of the subject matter of the agreement. There is nothing in the agreement which either expressly or by implication purports *to waive the right of the appellant to restore its property* in accordance with the provisions of the decree. In fact, the officers of the Navy who drew up this agreement and who executed it on behalf of the government affirm in writing *that the express understanding between the parties was expressly to the contrary.* The rule of construction as applied to a written release is stated in 54 C. J. 1241:

> "A release should be construed from the standpoint of the parties at the time of its execution, and in the light of their relations and their situation at the time it was formulated, and of the circumstances which surrounded the transaction; and extrinsic evidence is admissible to show the surrounding circumstances and the nature of the transaction to which the release was designed to apply." (Citing many cases.)

It is a fundamental rule of law that the general words in a release are restricted and controlled by any limiting language contained in recitals in the release which expresses more specifically the intention of the parties. The general rule in this regard is stated in 45 *Am. Jur.* 692 et seq., in Sections 28 and 29, and one of the cases cited in support of the text is *Van Slyke v. Van Slyke* (N. J.) 78 Atl. 179, 31 L. R. A. N. S. 778.

In the *Van Slyke* case a controversy existed between Evert Van Slyke and others in regard to certain probate proceedings and other matters. These controversies were settled by the execution of a release which is set out in full in the opinion. The language of the release is as comprehensive as it is possible to make it. Evert Van Slyke agreed on behalf of

> "myself, my heirs, executors, administrators and assigns, to remise, release and forever discharge" the releasees "from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings . . . claims and demands whatsoever, in law or in equity, which against them I ever had, now have, or which my heirs, executors, administrators or assigns hereafter can, shall, or may have for, upon, or by reason of any matter, cause or thing whatsoever" etc.

After the release was executed the administrator of Evert Van Slyke brought suit against the adverse parties to collect a promissory note.

The trial Court upheld the release as effective to cancel the claim asserted on the note, and this holding was reversed in the Supreme Court. The Court quotes from *Rich v. Lord,* 18 Pick. 325:

> "General words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the several demands to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent every part of the instrument is to be considered.

Practically the same conclusion as that above stated was reached in the case of *Texas and Pacific Railway v. Dashiell,* 198 U. S. 521, 49 L. Ed. 1150. There an individual who was injured in an accident signed a release which recited in part:

> "I hereby release and acquit and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages, and liability, of any and every kind or character whatsoever, for or on account of the injuries and damages sustained by me in the manner and upon the occasion aforesaid and arising or accruing or hereafter to arise or accrue in any way therefrom."

The release went on to specify the particulars in which this person had been injured. Thereafter the party signing the release brought an action in damages against the railway company for the injuries he had suffered in the accident mentioned in the release but which were not specifically enumerated on the face of the release. The United States Supreme Court held that the enumeration of specific injuries listed in the release limited the general language contained therein, and the release was not effective as to any injuries except those which were expressly described on its face. The Court said:

> "And the rule of construction should not be overlooked that general words in a release are to be limited and restricted to the particular words in the recital. The rule is illustrated by the case of *Union Pacific Railroad Company v. Artist,* 60 Fed. 365, 23 L. R. A. 581."

Common sense tells us that the rule above stated is the only one whereby an equitable result can be secured. However, in the instant case it is not necessary to go to the full extent of the rule referred to. In the instant case the owner, who is the appellant here, releases none of its own rights as established by the decree, but only an obligation which that decree imposes on the United States government. It specifies that the release applies only to "all manners of actions, liability and claims against the government"; that is, it releases its right to take affirmative action against the government which is designed to require the government to bear the burden of expense consequent upon the performance of the work of restoration.

It is an elementary rule of law that every contract contains an implied covenant of good faith and fair dealing between the parties. This implied covenant stems from the principle that the courts expect and demand that parties solemnly executing agreements shall observe the rules of common honesty and fair dealing and that one of the parties will not resort to sharp practice in order to deprive the other party of the benefits which the agreement is supposed to confer upon him. See *LaSheele v. Armstrong*, 263 N. Y. 79, 188 N. E. 163-7. There the New York Court of Appeals declared:

> "In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the rights of the other party to receive the fruits of

> a contract, which means that in every contract there is an implied covenant of good faith and fair dealing."

The same rule is accepted by the Supreme Court of the State of California. See *Tanner v. Title Insurance*, 20 Cal. (2d) 814 at 825:

> "Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. (*Williston on Contracts*, Vol. 5, Sec. 129-a)"

When Tanforan Company entered into an agreement which saved the United States government over $533,000.00 and relieved it from a burdensome duty, it was entitled to receive the fruits of this agreement; the benefits of its bargain. It is acknowledged that the intention of the agreement and the purpose of the Tanforan Company in the making it (concurred in by the United States through its agents) was to effect a more immediate and speedy completion of the work of restoration. This was the consideration, the *quid pro quo* which the Tanforan Company was to receive. That fact is admitted by the agents of the Civilian Production Administration themselves, for its Compliance Commissioner rendered a written decision on the application of this appellant to be permitted to proceed to do this work, which is quoted in part in our ancillary bill (T. R., p. 16) and reads as follows:

> "It thus appears that the United States, and I do not here distinguish between agencies and departments, has induced the Company, for the distinct benefit of the United States, to accept a settlement and has permitted the Company to commit itself by resuming possession of the

premises and doing a large amount of work, the United States being fully advised that the impelling consideration leading the Company to accept the settlement was the expectation of being able to restore the premises quickly so as to have the use of them by October 12, 1946. The United States has, in large part, received its *quid pro quo* under the settlement."

ASSUMING THAT THE RESTORATION AGREEMENT WAS, IN EFFECT, A SATISFACTION OF JUDGMENT, THE FACTS PLEADED BY APPELLANT IN ITS COMPLAINT WOULD JUSTIFY THE SETTING ASIDE OF SUCH SATISFACTION FOR WANT OR FAILURE OF CONSIDERATION OR FOR MISTAKE OR FOR NON-PERFORMANCE OF A CONDITION.

Assuming, without conceding, that the restoration agreement could be considered a satisfaction of the judgment in the condemnation suit, an application to set aside such a satisfaction of judgment would be proper in the same suit, and an independent suit for that purpose would not be necessary or proper.

In the case of *Argue v. Wilson*, 3 Cal. App. (2d) 635, a satisfaction of judgment which was entered was set aside upon motion to vacate such satisfaction of judgment in the same case. The Court held that the order setting aside the satisfaction of judgment was properly made in the immediate action in which the judgment was entered.

In *Clark v. Johnston*, 49 Cal. App. 315, the Court held:

> "Of course a party to the record may have a satisfaction, entered in fraud of his rights, set aside on motion in the immediate action in which the judgment is entered. (*Haggin v. Clark*, 61 Cal. 1)"

In *Kinnison v. Guaranty Liquidating Corp.* 18 Cal. (2d) 256, the Court said:

> "It is settled that where a satisfaction of judgment has been erroneously entered, it may be cancelled either upon motion made in the original

action, or by means of an independent action in equity between the parties."

See also:

Merguire v. O'Donnell, 139 Cal. 6;
15 *Cal. Jur.* 273;
2 *Freeman, Judgments*, Fifth Ed., p. 2410 et seq.
51 A. L. R. 243.

The cases are legion which hold that a satisfaction of judgment may be vacated in the immediate action for any of the following grounds: fraud, duress, undue influence, mistake, lack or failure of consideration, and non-performance of condition.

In the case at bar the allegations of the appellant's ancillary bill in equity would justify a finding that the satisfaction of judgment (assuming the agreement to be a satisfaction of the judgment) was entered into through mistake and, therefore, could be set aside and the relief prayed for granted.

51 A. L. R. 248.

The facts pleaded would also support a finding that there was a lack or failure of consideration justifying the same relief. See cases cited in 51 A. L. R. 253.

The same facts would justify the same relief for non-performance of a condition. Where a judgment is satisfied on condition that certain things will be done and there is a breach thereof, the parties satisfying the judgment can have the satisfaction set aside. See cases cited 51 A. L. R. 254. See also:

49 C. J. S., Sec. 584, page 1069;
34 C. J., Sec. 1132, page 734.

In the case at bar if the agreement constituted a satisfaction of judgment, the judgment was satisfied only in consideration of the payment of certain sums, the transfer of certain property, and the retention of the right to restore the property. If the right to restore the property is taken away or for some reason can not be had, the satisfaction should be set aside upon application of the party in whose favor the judgment runs—in this case Tanforan Company, Ltd.

If, instead of summarily granting the government's motion to dismiss, the lower Court had received evidence of the facts and circumstances surrounding the execution of the agreement and had found that there was a lack or failure of consideration or that the agreement was entered into under mistake or that there was a non-performance of a condition which constituted the motivating consideration for the execution of the agreement, the Court had the power and jurisdiction in the immediate action to so find and to declare that the settlement agreement or "satisfaction" be cancelled and set aside and that the government be restored in *status quo* by restoration of the consideration received by Tanforan Company from the government and that the judgment be reinstated and declared to be in full force and effect. Under such a decision by the lower Court Tanforan Company could have compelled restoraton of its premises at the government's expense and free from interference by the Civilian Production Administration, as work performed by the Navy would, of course, be exempt

from the effect of the regulations of the Civilian Production Administration. The District Court simply misinterpreted the true nature of the appellant's bill in equity, misinterpreted it as an application for relief under the contract, rather than under the judgment, as it clearly was, and granted the government's motion to dismiss and was in error in so doing.

The appellant was entitled to have the error of the lower Court corrected by this Honorable Court, and we respectfully submit that it was not within the province of this Honorable Court on appeal to hold for itself that the agreement constituted a satisfaction of the judgment and affirm an order made in the Court below upon other grounds.

There was no holding in the Court below that the restoration agreement constituted a satisfaction of judgment. That was not the ground for the lower Court's holding. That the ruling of the lower Court was in error in taking this view is unquestionable under the authorities cited in appellant's opening brief, the effect of which, we respectfully submit, this Honorable Court completely ignored.

The opinion of this Honorable Court states that there is an entire absence of any showing of sharp practice on the part of the government in arriving at the settlement. This statement implies that if there had been a showing of sharp practice, equity would give relief from the apparent effect of the document. Sharp practice is not the only ground for relief in equity. Equity recognizes other grounds, such as mistake and lack or failure of consideration. These are

the grounds pleaded by Tanforan. One can always go behind the wording of a document to explain its effect and the true intent of the parties. Failure of consideration justified the vacating of a satisfaction of judgment. 2 *Freeman Judgments*, Section 1166, page 2413.

The case of *Braselton v. Vokal*, 53 Cal. App. 582, was an action to compel the conveyance of real property. Plaintiff's action was based upon a written option given by the defendant for a recited consideration of $10.00 paid. It was held that the defendant might prove by oral evidence that there was no consideration for the option. The Court said:

> "That the law in California permits parol proof to show the want of consideration in written executory contracts is beyond question."

In *Royer v. Kelly*, 174 Cal. 70, the Court says:

> "The recitals of the two agreements furnish presumptive evidence of a valuable consideration. But the rule is that the parties are not stopped by recitals in agreements with respect to its consideration. The consideration, or the want of consideration, may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts which show a valuable consideration. (Citing cases). The question must, therefore, be determined *by an examination of the evidence*." (Emphasis ours)

See also:

Stanton v. Weldy, 19 Cal. App. 374;
Chaffee v. Browne, 109 Cal. 211;
National Hardware Co. v. Sherwood, 165 Cal. 1;
Richardson v. Lamp, 209 Cal. 668;
79 *U. of Pa. L. Rev.* 227.

If there is a failure of consideration, oral evidence is admissible to prove it. See

Massie v. Chatom, 163 Cal. 772;
Jefferson v. Hewitt, 103 Cal. 624.

Likewise, oral evidence is admissible to prove mistake, duress, or undue influence, lack of capacity, etc., although the document is in writing. The law is very clear to that effect.

In the case at bar the allegations of the pleadings of appellant set out facts which, if established, would afford relief to the appellant from the apparent effect of the terms of the restoration agreement. These facts for the purpose of the motion to dismiss *must be taken as true*. We respectfully submit, therefore, that on appeal from an order granting a motion to dismiss the Court should not for itself decide the ultimate fact. Can it be urged that if upon a trial of the issues, both parties were to come into court and admit that the restoration agreement was not a satisfaction of the judgment, and that it was not so intended, and that there was a failure of consideration or a mistake of fact or of law, that the Court would, nevertheless, in spite of such evidence and complete agreement of the parties as to the effect of the agreement, hold to the contrary and that the agreement was a satisfaction? How then, with an issue of fact raised by Tanforan's pleading, can this Court determine the effect of the agreement and decide the *facts?*

The decision of the Circuit Court seems to hold, in effect, that notwithstanding the uncontroverted allegations of fact that the agreement was not in-

tended to constitute a release of the right of Tanforan Company to restore, the trial Court would be compelled to hold otherwise. The restoration agreement was executed by Tanforan upon the assumption that it would be permitted to immediately restore the track. If Tanforan had known that it could not restore, it certainly would not have entered into the agreement and would have continued to accept $80,000.00 per year rental until the track was restored by the government in accordance with the decree.

The principal consideration for the execution of the agreement by Tanforan was its belief that it could immediately restore the premises. The government knew that that was the assumption of Tanforan and the prime, motivating consideration for the execution of the agreement by Tanforan. If that consideration failed or if there was a mistake of fact or of law, Tanforan Company would be entitled to relief. The allegations of its pleadings established such facts. The facts are not denied or contradicted, and they must be assumed, for the purpose of the motion to dismiss, to be true. The authorities support the position of appellant, but the decision of the Circuit Court completely ignores the effect of the admitted facts and the authorities cited by appellant in holding that the agreement is a satisfaction of the judgment, and that appellant is without remedy.

The Court below did not hold that the agreement was a satisfaction of judgment. The Court below held that the procedure taken by appellant was incorrect. In our opening brief on appeal we have

shown conclusively, and it is conceded by the government, that the procedure taken by Tanforan Company was correct. Now we find the Circuit Court on appeal upholding the decision *on a totally different ground.*

Wherefore we respectfully submit that a rehearing of this cause be granted and that the order of the lower Court dismissing the complaint be reversed, and that the matter be referred to the Court below for a trial of the issues of fact presented by appellant's complaint.

Respectfully submitted,

James F. Boccardo

Attorney for Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for appellant does hereby certify that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

JAMES F. BOCCARDO

Attorney for Appellant.

No. 11551

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director of Immigration and Naturalization, at Seattle, Washington,
Appellant,

vs.

CHI YAN CHAM LOUIE, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

FILED

MAY 26 1947

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THE ARGUS PRESS, SEATTLE

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

STATEMENT

Appellee, Chi Yan Cham Louie, Chinese, then 18 years of age, was admitted to the United States at the Port of Seattle on June 17, 1927, as the minor daughter of H. F. Cham, Chinese, then and continuously since prior to July 1, 1924, having been, a domiciled merchant at Portland, Oregon, duly admitted to the United States under Article II of our Treaty with China of November 17, 1880.

STATEMENT OF THE CASE

Appellee is here in response to the Government's challenge to the Order of naturalization granted her by the Honorable Lloyd L. Black, Judge of the United

States District Court for the Western District of Washington, Northern Division. This challenge the Government bases upon the theory that appellee's original admission was under the Act of Congress of May 6, 1924, rather than under Article II of the Treaty of 1880, and that such admission was not for permanent residence.

ARGUMENT

We think it well, on the threshold of the argument, to be reminded that the expressed two-fold purpose of the treaty was: First, to "limit or suspend, but not to absolutely prohibit" the coming of Chinese laborers; second, to exempt all other classes from this limitation; which (second) provision the treaty emphasizes in this express language—"other classes not being included in the limitations."

This right of unrestricted residence of all "other" classes is "copper-rivited" by the treaty in

"ARTICLE II

> "Chinese subjects, whether proceeding to the United States as students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States *shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.*" (Italics ours)

"Free will" is defined in Webster's Law Dictionary as the power of directing our own action without constraint by necessity or fate; voluntariness; spon-

taneoness. "Free" is defined in Black's Law Dictionary as not subject to legal restraint of another. "Unrestrained; having power to follow the dictate of his own will; not subject to the dominion of another. Enjoying full civic rights."

"Will" is defined in Black's Law Dictionary as wish; desire; pleasure; inclinational; choice; the facility of conscious, especially of deliberate, action.

"Immunity" is defined by the dictionary as freedom from duty or penalty.

It would be difficult to find words to more definitely define any human being as a completely free agent in his movements than the words here used.

Pertinent to the point that our policy of the period on the subject was directed against Chinese laborers only, is the veto message of then President Hayes of March 1, 1879, returning to the Congress a measure "To restrict the immigration of Chinese to the United States," the act applying indiscriminately to Chinese of all classes.

The President's study of the subject developed the fact that Chinese were brought here as contract laborers—"a servile importation"—as the President put it (Messages and Papers of the Presidents, by Richardson) Vol. VII, page 514, at page 517.

This was the atmosphere in which the year following was brought to conclusion our treaty with China of 1880 limiting the admission of Chinese to laborers, extending to all other Chinese the right "to go and come of their own free will and accord."

Without raising the question of good faith in this

action, or even entertaining an interrogative thought in that direction, it seems strange that after two-thirds of a century of continued recognition of those of appellee's class as permanent residents, there should now be selected as the victim of an inquiry this appellee, of whom Judge Black in his oral decision said:

> "From the standpoint of public policy, a girl who came here as a minor in 1927 as the daughter of a Chinese merchant who came here long before under the treaty, and who married an American citizen in 1941, is certainly as promising material for good citizenship as one who came to the United States yesterday as an immigrant."

And Judge Black followed with this further observation which we commend to the court:

> "Under the decisions of the Supreme Court of the United States and of the Circuit Court of Appeals as I read them, and the obligations we have to comply with the spirit of the treaty, it seems to me both legally, and in honor as a matter of public policy, this petitioner should be permitted to take the examination touching upon her knowledge of the Constitution and laws of the land."

Judge Black in this expression adopted the characterization by the eminent Mr. Justice Holmes of a treaty as the nation's highest engagement, his language being:

> "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution; while treaties are declared to be such when made under the authority of the United States."

Missouri v. Holland, 252 U.S. 415.

The clearly expressed purpose of this treaty is to exempt from its limitations all classes of Chinese other than laborers.

> "A treaty is to be executed in the utmost good faith, with a view of making effective the purpose of the high contracting parties."
>
> *Sullivan v. Kidd*, 254 U.S. 433.

And is to be construed favorably to the rights claimed under it:

> "A treaty is to be construed in a broad and liberal spirit, and where two constructions are possible, one restrictive of the rights that may be claimed under it and the other favorable to them, the latter is to be preferred."
>
> *Asakura v. Seattle*, 265 U.S. 332.

Likewise, because of the comparative strength of these contracting nations, any doubt as to construction of the treaty is to be resolved in favor of China:

> "A treaty between a superior and an inferior nation should be construed in favor of the latter."
>
> *Choctaw Nation v. United States*, 119 U.S. 1.

On the subject of the "Constitutional duty of the President to recommend to the consideration of Congress" such measures as he may judge necessary," President Grover Cleveland in a message to the Congress of March 1, 1886, said:

> "In no matters can the necessity of this be more evident than when the good faith of the United States under the solemn obligation of treaties with foreign powers is concerned."
>
> Messages and Papers of the Presidents, by Richardson, Vol. VIII, page 383.

Throughout the existence of our government it has been our commendable policy to encourage citizenship of aliens:

> "In view of the fact that these people seek the United States for the purpose of establishing themselves and of acquiring American citizenship, it would seem to be the office of wise statemanship to facilitate their admission and to provide for their incorporation into the body politic as speedily as may be prudent."
>
> Morse on "Citizenship by Birth and Naturalization" (1881) preface, page VIII.

In harmony with this policy, we officially provide schools and textbooks in its promotion.

This right to naturalization we have recently extended to aliens of petitioner's race. In what good conscience may we now justify administrative restrictions to this expressed legislative will? Shall we lend legitimacy to that familiar flippant phrase "a Chinaman's chance?"

The treaty interpretation as here contended for is supported by an unbroken line of judicial decisions beginning with the *Mrs. Gui Lim* case, 176 U.S. 459, practically contemporaneously with the treaty conclusion.

In that case the court held that the treaty exemption of merchants from its restrictive provisions, included by implication their wives and minor children.

Contemporaneously with its enactment, the Immigration Act of July 1, 1924, majored by appellant in its brief, was passed upon by the Supreme Court in *Cheung Sum Shee, et al. v. Nagle*, 268 U.S. 336, 45 S.

Ct. 539. Involved were a number of alien Chinese wives and minor children of domiciled Chinese merchants who arrived at San Francisco on July 11, 1924. With the question thus squarely before the court, the arrivals were held admissible under the treaty, unaffected by the Act of July 1, 1924, the language of the court being:

> "An alien entitled to enter the United States 'solely to carry on trade' under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act No. 3(6), and therefore is not absolutely excluded by Section 13. (1) The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the Treaty of 1880 and certainly possessed it prior to July 1st when the present Immigration Act became effective. *United States v. Mrs. Gue Lim, supra.* That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry. * * *
>
> "They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court 25 years ago."

In harmony also have been other court expressions on the question.

> "Immigration Act of 1924 does not destroy existing treaty rights."
>
> *Dang Foo v. Weedin*, 8 F.(2d) 221.
>
> *Ex parte Goon Dip*, 1 F.(2d) 811.
>
> "Aside from the duty imposed by the Constitution to respect treaty stipulations when they

become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. * * *"

Chew Heong v. United States, 112 U.S. 536 28 Law ed. 170.

And in the same case the court said, at page 559:

"Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

Following that quotation the court, in the same case, gives it this application:

"We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provision of the treaty."

Haff, Commissioner, v. Yung Poy, 68 F.(2d) 203, completely negatives appellant's contention that appellee should be denied the benefit she here seeks because her admission was subsequent to the Act of 1924. In that case Yung Poy, Chinese, was admitted on June 2, 1926, as the minor son of a domiciled Chinese merchant. As in the instant case he was admitted after enactment of the Act of 1924, and, as here, his admission was recorded as under 6(3) of the Immigration Act of 1924. In 1932 Yung Hong, the father, lost his status as a domiciled merchant, whereupon the son was ordered deported on the

ground that he had thereby lost the status under which he was admitted. Under a court writ he was discharged, and the Government appealed on the grounds: First, that his rights were measured by the Immigration Act of 1924 and not by the Treaty of 1880 under which his father was admitted; and second, that one admitted under the Act of 1924 as the minor son of a trader became subject to deportation if the father cessed to carry on trade.

The court went into the question exhaustively, concluding its review of the authorities with this statement:

> "We cannot concur in the view that appellee's rights are measured by the Immigration Act of 1924 rather than by the treaty. The Act of 1924 abrogated the treaty only as to the provisions thereof inconsistent with the provision of the Act. * * * Concondant with the right granted by the treaty to Chinese merchants to freely come and go, the Act recognizes the right of an alien 'entitled to enter the United States solely to carry on trade in pursuance of the provisions of the treaty of commerce and navigation.' Section III(6) Act of 1924."

Corroborative of the point stressed throughout this brief, that appellee's status follows and is fixed by that of her merchant father's entry under the treaty, is this voluntary statement of the court in the above *Yung Poy* case: "What the rights of such aliens would be if *the merchant* had been admitted after the passage of the 1924 act is a question we need not consider" (Italics ours).

And finality is fixed upon the treaty as the deciding

factor in the instant case by this expression of the Supreme Court:

> "A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."
>
> *Chew Heong v. United States*, 112 U.S. 536, 5 S. Ct. 255.

So definitely divided by the treaty are the two classes (laborers, and "all others") that the latter may change their occupation within the classification, without losing their exempt status.

> "Chinese alien, entering the country under traveler's certificate *held* entitled thereafter to change status to treaty merchant under treaty with China of 1880."
>
> *Dang Foo v. Day*, 50 F.(2d) 116.

The court goes exhaustively into the question reviewing previous decisions concluding its review with this statement: "In view of these decisions we are of opinion appellee's right to remain in the United States is measured by the treaty and not by the Immigration Act of 1924, *even though he came here after the passage of that Act.*" (Italics ours.)

This case also squarely affirms our contention that appellee's rights here both of admission and of continued residence, are fixed by the status of the father unqualified by any purported restrictions incorporated in her certificate of arrival.

IN ANSWER TO APPELLANT

Throughout its brief appellant cites many cases of persons of nationality other than Chinese. These cases are of course not pertinent to the question here involved—of a nationality covered by special treaty regulation. This the appellant admits by the statement on page 24, that "appellee's status stems initially from Article II of the Treaty of November 17, 1880," followed by the statement that under the *Mrs. Gui Lim* case the right of entry of merchants "extended by necessary implication to the wives and minor children of Chinese merchants." And on page 26 is the further admission that "In enacting Section 3(6) of the Act of 1924, Congress did not seek to nullify existing treaties."

The authorities cited by appellant, as we interpret them, fall short of meeting the issue here. They do not overcome the fact that appellee was admitted for permanent residence under the Treaty of 1880, which permanency of residence was not limited by the Act of 1924 as our authorities clearly show; appellant attempting to fasten on such admission that "it must be admission as an immigrant" (Appellant's brief, p. 17) for which there is clearly no such requirement.

Many of appellant's cited adjudications (particularly on pages 22, 27 and 28, are of nationalities other than Chinese and are not protected by any treaty engagement, as is appellee, which distinction is admitted by appellant's statement on page 24 of its brief, that she was admitted under the treaty.

As to the cases mentioned on page 25: (Lo) Hop

was admitted as a merchant, then became a laborer under circumstances which established that he came in fraudulently. (Wing Sun) Fay, becoming a laborer soon after his admission as a merchant was taken into custody, charged with fraudulent entry, which charge the Department failed to prove, and he was discharged. *U.S. v. Duck* occurred prior to the Act of 1924. In *Yen v. Frick*, Yen, admitted as minor son of merchant, soon became a laborer and was proceeded against as a fraudulent admittee but was discharged for lack of evidence. Soon thereafter he became a public charge, and was deported on that ground.

From a careful analysis of appellant's cited cases, we are unable to find any which shake the legality or good faith of appellee's admission and continued residence. Many of them, and much of appellant's argument are on technicalities which we confess we cannot follow.

Appellant's brief, especially from page 8 on deals broadly with the general subject before the court, but we assume that its assignments of error on that page mark the limits within which its argument may be considered.

CONCLUSION

We have herein given the court the benefit of such light as has been made available to us through judicial adjudication and reasoning otherwise; and we respectfully submit that upon the record before the court, the decision of the District Court should be in all things affirmed.

FRED. H. LYSONS,

Attorney for Appellee.

No. 11551

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director Immigration and Naturalization Service, Seattle, Washington,

Appellant,

vs.

CHI YAN CHAM LOUIE,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POSTOFFICE ADDRESS:
1020 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 6/4/47 -- 45 COPIES

JUN 13 1947

No. 11551

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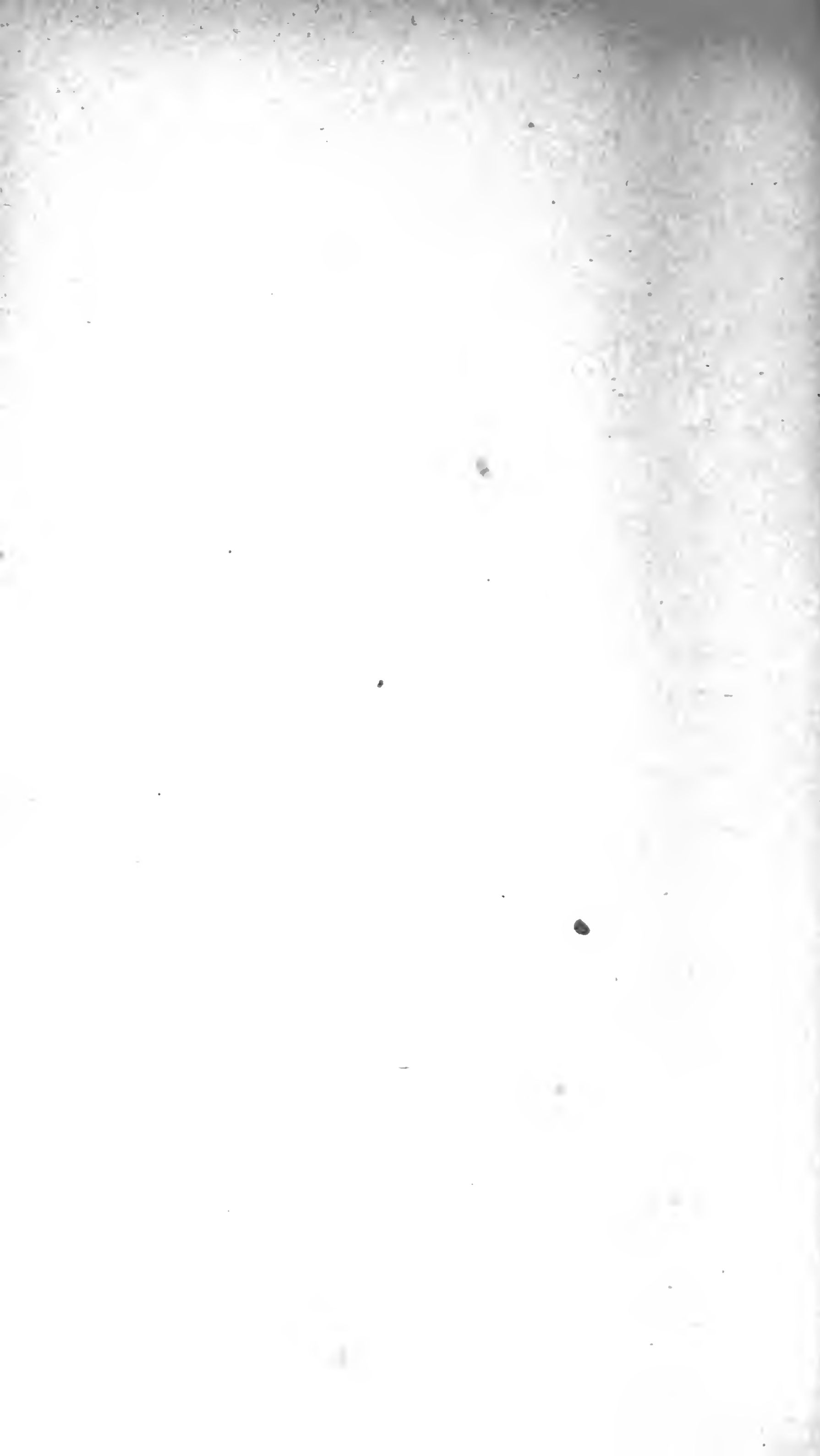

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HONORABLE LLOYD L. BLACK, *Judge*

REPLY BRIEF OF APPELLANT

Appellee neither cites authority upon nor argues the only question on this appeal, but her counsel contents himself with a discussion of the Immigration laws, the Treaty with China, and cases involving only the rights of Chinese lawfully admitted to this country under the Treaty to be and remain in this country free from *deportation.* That question is in no sense

involved in this case, as appellee's deportation is not sought.

As stated in our opening brief, the sole and only question in this case is: Is a "non-immigrant" Chinese, admitted to this country in 1927 under the Treaty of 1880 with China, as the daughter of a Chinese merchant, eligible to United States citizenship? To this question counsel has not addressed himself.

The burden of counsel's argument is, and all of the authorities cited by him deal entirely with this Treaty, and the rights of aliens admitted thereunder *to remain in this country.* Not one word is said about the right of Chinese citizens admitted to the United States in pursuance of the provisions of the Treaty or the law as to United States citizenship, if such exists, nor does counsel cite any authority to sustain the trial court's order admitting appellee to United States citizenship.

The question indirectly involves the immigration laws, but directly draws in question the proper application of the *naturalization laws*, to those Chinese admitted under the Treaty.

Of course, the Treaty deals with immigration, and the rights of Chinese subjects "whether proceeding as students, merchants, or from curiosity, to-

gether with their body and household servants and Chinese laborers who are now (then) in the United States" to enter and remain here. It nowhere even remotely deals with the subject of *naturalization.*

Their rights, under this Treaty were the subject of inquiry and decision by the United States Supreme Court in 1925 in the case of *Cheung Sum Shee v. Nagle,* 298 U.S. 336, cited in our opening brief.

At the time of that decision Chinese could not enter the United States as *immigrants.* They *were* admitted for an indefinite period as *non-immigrants,* such as students, merchants, or as visitors, and were and still are "allowed to go and come of their own free will and accord" and were "accorded all the rights, privileges, immunities which are accorded to citizens and subjects of the most favored nation," except as later modified by the Convention of 1894, as hereinafter set out herein.

Prior to 1943 there was no immigrant quota for China.

Appellee was admitted in 1927 as the minor daughter of a merchant who was admitted under the Treaty prior to 1924.

Counsel argues at page 5 of his brief that the purpose of the Treaty was to exempt from its limita-

tions all classes of Chinese other than laborers. With this we disagree.

Clearly, the purpose of Article II of the Treaty was to promote trade between China and the United States, and it was therefore agreed between the high contracting parties that "*merchants*" shall "be allowed to go and come of their own free will and accord" and as such "shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation," except as hereinafter noted.

These provisions were construed by the Supreme Court in the Cheung Sum Shee case in 1925 (298 U.S. 336) to include the wives and minor children of such "merchants."

The Treaty with China concluded November 17, 1880, is strictly an immigration treaty. Article I provides:

> "Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall

apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, and immigrants shall not be subject to personal maltreatment or abuse."

A Convention Regulating Chinese Immigration was concluded March 17, 1894, by which immigration of Chinese laborers was prohibited for ten years.

By Article IV of that Convention it was provided:

"In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghaii, sixth year) it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* * * *"

The Treaty as to Commercial Relations with China was concluded October 8, 1903, and by Article XVII thereof it is provided *inter alia*:

"It is agreed between the High Contracting Parties hereto that all the provisions of the several treaties between the United States and China which were in force on the first day of January, A.D. 1900, are continued in full force and effect, except in so far as they are modified

by the present Treaty or other treaties to which the United States is a party.

"The present Treaty shall remain in force for a period of ten years beginning with the date of the exchange of ratifications and until a revision is effected as hereinafter provided."

Ratifications were exchanged January 13, 1904.

It was during the period subsequent to the ratification of this Treaty that the ancestor of appellee was admitted to the United States under the provisions of Article II of the Treaty of 1880 as a "merchant," which Treaty was expressly continued in effect and by the provisions of Article IV of the Convention with China dated March 17, 1894, regulating Chinese Immigration to the United States the right to naturalization of these "merchants" and as, of course, their offspring coming to the United States under the protection of that Article, was expressly denied by the words *"excepting the right to become naturalized citizens."*

At page 3 of his brief, counsel "without raising the question of good faith," or "even entertaining an interrogative thought in that direction" says, nevertheless, "it seems strange that after two-thirds of a century of continued recognition of those of appellee's class *as permanent residents,* there should now be selected as the victim of inquiry the appellee."

There is nothing whatever in the position taken by appellant which even remotely suggests the upset of the long-continued recognition of the rights of Chinese Treaty merchants or their offspring. The Treaty makes no provision for *naturalization* of these Chinese citizens. There is no justification for the claim as made by counsel that they were admitted as "*permanent residents.*" The fact is, the Treaty itself and the law provides that the only rights granted are the right of entry "*to go and come as they please.*"

As has been seen, the Convention Regulating Chinese Immigration concluded March 17, 1894, by Article IV clearly negatives the idea that such persons may become "*naturalized citizens,*" which is one of the privileges expressly denied by that convention.

Appellee, herself, is the one who brought about the present inquiry by *seeking citizenship*, apparently conceiving that her long-continued residence in the United States since the passage of the Chinese Exclusion Repeal Act entitled her to United States citizenship. She applied for United States citizenship (one of the privileges expressly denied by the Convention) and at the hearing before a Naturalization Court, the Immigration and Naturalization Service interposed an objection to her naturalization because she belonged to a class not entitled to that privilege under

the naturalization laws of the United States, on the ground that she was not admitted (in 1927) as an immigrant for *permanent residence* in contemplation of either the Immigration or Naturalization laws, but *solely* as the minor daughter of a Chinese "merchant" under the Treaty with China for an *indefinite stay* with the privilege *"to go and come" of (her) own free will and accord."*

The case of *Haff, Acting Commissioner, v. Yung Poy* (from this court), 68 F (2) 203, cited by appellee, was not one admitting to United States *citizenship* a Chinese subject, but *involved deportation* proceedings and can be of no assistance in the consideration of the instant case because *deportation is not here sought*, but rather *"naturalization" prevented*, on the ground that appellee is not eligible to naturalization. She has never qualified for such, as required by either the Immigration Act or the Naturalization laws.

Counsel for appellee seems to infer that every Chinese and their offspring admitted to the United States under the Treaty of 1880 as a *"merchant"* is entitled to the benefit of our naturalization laws, which, of course, is not true. Effect must be accorded the Immigration Act of 1924 and the Nationality Act of 1940 and consideration given the Senate Report No. 535 of the 78th Congress, 1st Session, on the

Chinese Exclusion Repeal Act of 1943 (57 Stat. 600). By this latter Act, Congress merely placed the Chinese on a parity with other racial groups in the future and provided that they should *qualify for naturalizattion* in exactly the same manner as all other foreign applicants and nothing more.

In the Pezzi case (29 F. (2d) 999) cited in our opening brief, the Treaty of Commerce and Navigation with Italy of 1871 (17 Stat. 845) was under consideration. That treaty, like the treaty of 1880 with China, admitted "merchants" for temporary indefinite stay and in referring thereto, the Court said:

> "This treaty (with Italy) defines the status of Italian citizens in the United States and citizens of the United States in Italy (Article I). *It clearly contemplates the temporary stay of the merchants of one country in the territory of the other.* It accentuates the fact that the citizen of the one country is entitled to certain rights and privileges in the other country, including the privilege of being accompanied by wife, minor children, servants, etc., *solely* and *wholly* because such citizen of one country is in the other country temporarily and for no other purpose than to carry on trade."

That is precisely the effect of the treaty with China of 1880.

The Pezzi case involved an Italian woman who originally entered the United States *as a visitor* in 1925 and a year later applied for and was granted a

change in her status, which was granted, and she registered as the wife of an Italian Treaty merchant. She thereupon applied for naturalization, which was denied, the Court stating:

> "Has the petitioner here met the requirements of the law? I think not. The petitioner has no status in the United States, other than being the wife of her husband."

The Treaty with Italy of 1871 (17 Stat. 845) by Article I defines the status of Italian citizens in the United States and citizens of the United States in Italy, and is similar to the treaty with China of 1880 in the respect to "merchants."

The Court, continuing in the Pezzi case, said:

> "It clearly contemplates the *temporary stay* of the merchants of one country in the territory of the other."

In the Cheung Sum Shee case (298 U.S. 336) the Supreme Court said in no uncertain terms:

> "An alien entitled to enter the United States *solely to carry on trade* under an existing treaty of commerce and navigation *is not an immigrant* within the meaning of Act (Sec. 3 (6)) and therefore is not absolutely excluded by Sec. 13."

By being admitted to the United States in 1927 as the minor daughter of a Chinese treaty "merchant," appellee acquired no greater rights to permanent residence than her ancestor. She, like Mrs. Pezzi, has

no status in the United States other than being the wife of her husband.

The Congress, by Sec. 14 of the Immigration Act of 1924, 59 Stat. 669, 8, U.S.C. 215, provided:

> "The admission to the United States of an alien excepted from the class of immigrants by clauses (1), (2), (3), (4), (5), (6), or (7) of Section 3 shall be for such time and under such conditions as may be by regulations prescribed * * *."

We have referred in our opening brief to the Chinese Rules of October 1, 1926, promulgated by the Commissioner of Immigration with the approval of the Secretary of Labor, under authority contained in Section 24, Immigration Act of 1924 (43 Stat. 166, 8 U.S.C. 224).

Such rules and regulations which do not conflict with the Act of Congress or Treaty have the force of law.

Shizuko Kumanomido v. Nagle
(1930) 40 F (2) 42

Because appellee has not, since her admission to the United States as the minor daughter of a Chinese merchant, qualified for naturalization as required by Part 322, Title 8, Code of Federal Regulations, under authority contained in Sec. 327 of the Nationality Act of 1940 (54 Stat. 1150; 8 U.S.C. 727) she is not eligible for naturalization.

The Supreme Court said in *United States vs. Manzi*, (1928), 276 U.S. 463, 467; 48 S. Ct. 328; 72 L.ed. 654:

> "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."

There can be no doubt that the appellee herein was admitted to the United States in 1927 as the minor daughter of a Chinese "merchant" who was admitted under the treaty of 1880. The Immigration Act of 1924 was then in full force and effect, as was the Convention Regulating Chinese Immigration of 1894, by virtue of Article XVII of the Treaty as to Commercial Relations with China concluded October 8, 1903, and ratified January 13, 1904, and having seen that by the plain provisions of Article IV of the convention that all privileges concerning the protection of property rights that are given by the laws of the United States to citizens of the most favored nation, "*excepting the right to become naturalized citizens*," were preserved to these treaty traders, it is rather difficult to conceive how appellee may find any comfort in her claim of the right to naturalization under the treaty of 1880.

In view of what the trial court said at R. 36:

"It is conceded by the government that the pe-

> tioner is the wife of an American citizen and entitled to citizenship by virtue of her marriage, understanding of the American government, and attachment to the principles of our Constitution and of our government, provided she is entitled to admission to citizenship by virtue of the nature of her entry into the United States and her father's status. * * *"

It is important that the record be examined to ascertain the nature of the proof respecting the marital status of the appellee, since it appears there is no such proof on this phase as is exacted by law and judicial decision.

Petition of Sam Hoo (1945) 63 F. Supp. 439.

The only evidence offered before the Naturaliza-Court touching the marriage of appellee to an American citizen is contained in the record at pages 29 and 30 as follows:

Q. (by the court) Are you married?
A. Yes, sir.

Q. Where was your husband born?
A. China.

Q. Your husband was born in China?
A. Yes, your Honor.

Q. Is he an American citizen?
A. Yes, your Honor.

Q. When did he become an American citizen?

A. His father was born in Portland, Oregon, and that makes him a citizen.

Q. He is a son of a native born American citizen?

A. Yes, your Honor. (R. 29)

Q. And your husband is an American citizen?

A. Yes, your Honor.

Q. Was your husband an American citizen at the time you married him?

A. Yes, your Honor.

Q. When did you marry him?

A. In 1941 in May.

Q. Where?

A. Reno, Nevada.

Q. Had you ever been married before?

A. No, your Honor.

Q. Had he?

A. Yes.

Q. Have you had any children?

A. Yes; he had.

Q. Have you any children?

A. No.

Q. You have no children?

A. No. (R. 30)

In the cited case (Sam Hoo) District Judge Goodman, in denying the application of Hoo for naturalization said this:

> "The evidence as to the validity of petitioner's California marriage is not 'satisfactory.' Citizenship is not to be bestowed upon an applicant, under section 711 merely by showing that he indulged in a *ceremony* of marriage with an American citizen spouse. The door would be open to fraud and the United States could easily be imposed upon if an applicant under section 711 could rest his case upon a ceremony of marriage and the so-called presumption of validity under California law. Hence it is that the burden of proof never shifts from a petitioner for citizenship to the government."

While this question was not stressed in the trial court in the instant case, it is a matter of vital importance and one not to be lightly brushed aside. So that, should this honorable court, for any reason, determine that the other matters raised on this appeal are without substantial merit the case should nevertheless be sent back to the lower court with directions to set aside its former order and further pursue the question of the legality of the marriage of appellee in the light of the "unsatisfactory" condition of the record in that respect.

Appellee not having cited any authority to sustain

her right to naturalization, and not having argued the point in her brief, it is respectfully submitted that the order of the trial court was erroneous, should be set aside and the trial court directed to enter an order denying the petition of appellee.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney.

JOHN E. BELCHER,
Assistant United States Attorney.

No. 11553

United States
Circuit Court of Appeals
For the Ninth Circuit.

BYRON W. WOOD,

Appellant,

vs.

PAUL GREIMANN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division

FILED
JUN 13 1947
PAUL P. O'BRIEN,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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CERTIFICATE OF COMMISSIONER

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

No. 5524

I, the undersigned, United States Commissioner for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, do hereby Certify that the following documents are full, true and correct copies of the final order and other proceedings pertaining to the appeal of Paul Greimann, individually and as administrator of above entitled estate, namely:

Will.

Order Admitting Will to Probate and Appointing Administrator With Will Annexed.

Amended Petition for Removal of Administrator, Contest of Purported Will, to Set Aside Admission of Will to Probate and Application to Set for Hearing.

Motion to Dismiss Amended Petition of Byron W. Wood for Removal of Administrator, Etc.

Order Denying Motion to Dismiss Amended Petition of Byron W. Wood for Removal of Administrator, Etc.

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Reply of Byron W. Wood.

Application for Commission to Take Depositions.

Objections to Issuance of Commission to Take Depositions.

Order Overruling Objections to Issuance of Commission to Take Depositions, Etc.

Order and Decree Revoking Order of March 6, 1945, Admitting to Probate a Certain Document Dated 9/26/31, and Envelope Attached Thereto, as Last Will and Testament of Decedent.

Notice of Appeal.

Exceptions of Paul Greimann, Administrator, to Decree Revoking Order Admitting to Probate a Certain Document as Decedent's Last Will and Testament, and Adverse Intermediate Rulings.

In the Matter of the Estate of J. M. Pearl, Deceased, Probate No. 1019 on file and of record in my office.

In Testimony Whereof, I have hereto subscribed my name and affixed my official seal at Fairbanks, Alaska, this 5th day of August, 1946.

[Seal] /s/ ELEANOR M. ELY,
United States Commissioner and Recorder, Fairbanks Precinct.

Filed in the District Court, Territory of Alaska, 4th Div., Aug. 15, 1946. John B. Hall, Clerk. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

APPELLANT'S EXHIBIT A

Mount Alto Hospital, Washington, D. C.
2650 Wisconsin Ave. 9-26-31.

Dear (Boy) Paul,—I had supposed that I would be quite a ways on my homeward bound journey by this time but fate deals elusively at times and handles our courses and actions in a curious and extremely decisive manner at times. I was discharged on Sept. 17th and expected to start home on the 18th but not having received the desired results at the Naval Hospital, Judge Wickersham and Dr. Cline head of the Veterans Bureau stopped the effect of my discharge and I was put in Mt. Alto Hosp. the greatest diagnostician center in the world, where they can call in any expert from anywhere in the world that they choose, to examine or treat you. It almost takes an act of Congress to get in here but when Dr. Cline puts his stamp on your entry it is done, but usually it is most difficult to get him to acquiesce in it. Well I am here and so much examining as I have gone thru has nearly worn me out. Last Thursday I had the worst spell from several standpoints that I have ever had. The headache, breastache, and stomach nausea, a resultant of their co-operative aches were very severe and the almost complete blindness that came upon me lasted more than 12 hours the longest spell I have ever had. Rev. Youel will remember that I had a similar spell in the Syria Mosque assembly room there at Pittsburg on June 2nd, but it lasted only about 4 hrs. I had 3 major and several minor ones

at the Naval hospital. They did not understand them at all so that is why I am here. Dr. Ballou, who has my case in charge, is a wonderful man—he goes right to the bottom of things—he is having me treated for chronic diarrhoea now but is looking after my eyes every day.

This is a wonderful place everything is so nice. The corpsmen, nurses and doctors are all so pleasant and cordial. Interested in your welfare and cure. Everything is so neat and clean. The dining room beautifully clean white spreads and table service attractive and orderly but the cooks and waitresses are negroes as all of the menial work is done by negroes.

I am sitting writing to you with a thermometer in my mouth as my temperature is to be taken every 2 hours. The nurse just brot it to me it is marked at 4 P.M. which is right at hand now. I started out to church today and got 3 blocks on my way when the eye pressure commenced and I turned back none too soon either for both the head and breast ache commenced and were quite severe when I arrived back at the hospital and jumped into bed. In about an hour the spell was gone. My head still aches but the vision dimming is all gone again.

We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, and in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Galligher to help him in his education. I would ask to be buried here in Arlington Ceme-

tery. I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly.

I saw in the paper today a heavy snow fell yesterday there in Fairbanks holding those fliers who came from Nome.

I hope this finds you all well and busy.

We have recently had two good rains and it is down in the 50s today so of course is nice and cool I hope it continues do. I hear a fellow preaching over the Radio. We can take down phones (ear phones) any time until 10 P.M. as there is a set attached to every bed. We hear everything of importance going on in the world. Recently we heard a wonderful program held over in Ireland. I heard the Pope address a [2] crowd in Rome. We heard Hoover address the Legion in Detroit. The finest musical programs so far have come from New York Berlin and Sweden. The finest church program comes from Maine every Sunday night at 9 to 9:45. I have listened to it all summer. Tell Rev. Youel about my being detained here for a time. I am so anxious to get home and see you all and the babes. It has been a long summer I tell you.

With love & best wishes to all

As ever

DAD J. M. PEARL.

J. M. Pearl (Stamp)
Mt. Alto Hosp.
Washington, D. C.

Washington
D. C.
Sep. 27
1030 PM
1931

Paul Greimann
Fairbanks,
Alaska

Filed: February 20, 1945. Eleanor M. Ely, U. S. Commissioner & Ex Officio Probate Judge.

(Entered in Volume 1 of Wills, Page 448.) [3]

In the Probate Court, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska

In the Matter of the Estate
of
J. M. Pearl, Deceased

No. 5524

No. 1019

ORDER ADMITTING WILL TO PROBATE AND APPOINTING ADMINISTRATOR WITH WILL ANNEXED

The petition of Paul Greimann, of Fairbanks, Alaska, praying for his appointment as Adminis-

trator with Will Annexed of the Estate of J. M. Pearl, deceased, and for the admission to probate of that certain written document signed by said decedent on September 26, 1931, as the Last Will and Testament of said decedent, coming on to be heard, and it appearing to said Court that said J. M. Pearl died at Council Hill, Oklahoma, on July 8, 1944; that at the time of his death, and for a long time prior thereto, he was and had been a resident and inhabitant of Fairbanks Precinct, Alaska, and left estate therein and within the jurisdiction of this Court of the probable value of Ten Thousand Dollars; that he left a certain written document dated 9/26/31 signed by said decedent and written in his own handwriting, purporting to be his last will and testament, which said document was mailed to said Paul Greimann from Washington, D. C., on Sep. 27, 1931, in an envelope addressed in the handwriting of said decedent, which said document the Court now finds to be a valid holographic Will under the laws of the Territory of Alaska; that no person was named in said Will as Executor thereof; that decedent, at the time of executing said Will, was over the age of twenty-one years, and, in all respects, was competent to devise his estate; and that due notice of the hearing of the petition of Paul Greimann for appointment as Administrator with Will Annexed of the above entitled estate, as required by law, and pursuant to the Order of this Court regularly made and entered herein on February 20, 1945, has been given and proof thereof filed herein; that no person or persons have appeared at this hearing to object thereto or to assert

his or their right to the administration of said estate in opposition to the petition of said Paul Greimann; and that said [4] Paul Greimann is competent to act as such Administrator;

Now, Therefore:

It Is Hereby Ordered, Adjudged, and Decreed That the document hereinabove mentioned, and the envelope thereto attached, be, and is hereby, admitted to probate as the Last Will and Testament of said J. M. Pearl, deceased.

It Is Further Ordered, Adjudged, and Decreed That said petitioner, Paul Greimann, be, and he is hereby, appointed Administrator with Will Annexed of the Estate of J. M. Pearl, deceased, and that Letters of Administration with Will Annexed issue to him upon his taking the Oath required by law and executing a proper Bond in the sum of Ten Thousand Dollars to be approved by this Court.

Done in Open Court, at Fairbanks, Alaska, on this 6th day of March, 1945.

[Probate Court Seal]

ELEANOR M. ELY,

United States Commissioner and Ex Officio Probate Judge, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska.

Filed: March 6, 1945. Eleanor M. Ely, U. S. Commissioner & Ex Officio Probate Judge.

(Entered in Volume 17 of Probate Records, Page 407.) [5]

Before the United States Commissioner Ex Officio Probate Judge for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska

In re: Estate of J. M. Pearl, Deceased

No. 1019

AMENDED PETITION FOR REMOVAL OF ADMINISTRATOR, CONTEST OF PURPORTED WILL, TO SET ASIDE ADMISSION OF WILL TO PROBATE AND APPLICATION TO SET FOR HEARING

Comes now Byron W. Wood of Council Hill, Oklahoma, a full brother of the deceased, J. M. Pearl, and one of the heirs at law, and moves the Court to set aside the order appointing Paul Greimann as administrator with will annexed, to set aside the order admitting the purported will to probate; for an order denying the final account; for an order holding the purported will to be void and ineffectual as a will; to set aside all orders made in this cause, and for an order setting this matter for hearing at a definite date allowing sufficient time for the taking of depositions in Oklahoma, and such other relief as the court deems necessary and proper, and for grounds alleges:

1.

That said purported will, alleged to have been executed in Washington, D. C., on the 26th day of September, 1931, is not a will and is insufficient in its content to amount to a will of any kind. Said instrument was not executed in the manner required by the laws of the District of Columbia at that time,

which laws were in full force and effect in the District of Columbia where it is alleged this purported will was executed. Said laws authorizing the executing of a valid will were in words and figures as follows to-wit:

> "All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; and, moreover, no devise or bequest, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence and by his direction and consent; but all devises and bequests shall remain and continue in force until the same be burned, canceled, torn, or obliterated by the testator or by his direction in the manner aforesaid, or unless the same be altered or revoked by some other will, testament, or codicil in writing, or other writing of the testator signed in the presence of at least two witnesses attesting the same, any former law or usage to the contrary notwithstanding. (Mar. 3, 1901, 31 Stat. 1444, ch. 854, § 1626.)" [6]

2.

That said instrument relied upon as a will herein is further void, ineffective and insufficient to confer

upon Paul Greiman, who is not a relative or heir of the deceased, J. M. Pearl, any right, power or authority to apply to this Court for an administration of the estate of J. M. Pearl; in that if said letter upon which Paul Greiman bases his right to inherit should be determined to be a holographic will, which this petitioner specifically denies, then this document is contingent and unenforceable due to the terms thereof in that the only clause is said letter or instrument in any way purporting to be a will or testament is contingent and contains these words "and in case I die, if they do operate," and that said contingency never came about; they did not operate on J. M. Pearl, and he did not die from the operation, but lived many years thereafter, and died from another separate and different cause. Said letter, if intended as testamentary at all, which is hereby denied, is only a contingency, based upon a belief of the said J. M. Pearl that he was about to be operated on, and was to take effect only in case of his death from said operation, which contingency never came about.

3.

This petitioner further alleges that he is the full brother of the deceased man, who was well known at Fairbanks, Alaska, under the name of J. M. Pearl, whose true name is J. Maurice Wood, and the discrepancy in the names was brought about by the following facts and circumstances to-wit: At his birth he was named J. Maurice Wood and was born a full brother, of this petitioner Byron

W. Wood; the father and mother of these two children were later divorced and the mother moved to California and there took the name of Pearl, and J. Maurice Wood living with her was called Maurice Wood Pearl and became known as such.

4.

Petitioner further alleges that Paul Greiman is no relation to the deceased, and was never adopted by the deceased, is not an heir at law of the deceased, and has no legal right, and has never had, to apply for letters of administration; therefore no legal right to act as administrator, and by so doing committed a legal fraud on the Court and all proceedings based thereon are void and should be set aside, vacated and held for naught. [7]

5.

That said petitioner is the duly qualified and acting administrator of the estate of the deceased Maurice O. W. Pearl, having been appointed by C. J. Blimm, Judge of the County Court of Oklahoma County, on the 31st day of July, 1945. A certified copy of the appointment is hereto attached marked exhibit "A" and made a part hereof, by reference.

6.

Petitioner further alleges that his brother J. Maurice Wood, known as Maurice Wood Pearl, also known as J. M. Pearl, was a veteran of the Spanish American War, was seventy-five years and sixteen days of age at the time of his death, which took place July 8, 1944, in the Veterans Hospital

at Muskogee, Oklahoma, which the said deceased was a resident and inhabitant of the State of Oklahoma and was buried at Fort Gibson, Oklahoma on July 9, 1944.

7.

Petitioner further alleges that the deceased J. Maurice Wood, also known as J. M. Pearl, was not of sound and disposing mind on the 26th day of September, 1931, and therefore any attempted disposition of his property by will or otherwise on or about that date would be void and insufficient to convey any interest in any of his property whatsoever.

8.

That at the time of the death of J. M. Pearl, also known as Maurice O. W. Pearl, he had a living wife whose name was Musetta Wood Pearl, and that both of them were residents and citizens of the State of Oklahoma, and that Section 107, Title 84, ch. 2, Oklahoma Statute Annotated, 1941, was in full force and effect and binding on all parties hereto. Which section is in words and figures as follows to-wit:

> 107. Effect of testator's marriage or issue as revocation.
>
> "If after having made a will, the testator marries and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survive him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will or in some way

> mentioned therein as to show an intention not to make such provision; and no [8] other evidence to rebutt the presumption of such revocation can be received. If, after making a will, the testator marries, and, the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will." (R.L. 1910) (8364)

That Musetta Wood Pearl filed suit in the District Court of the State of Oklahoma, on May 9, 1927, naming Maurice Orpheus Wood Pearl as defendant, same being cause number 2631-D, thereafter obtained a judgment granting a divorce on June 30, 1927. Said judgment being based upon service by publication, and thereafter on May 7, 1942, motion to vacate and set aside the purported decree was filed in said cause, and on the said 7th day of May, 1942, by mutual consent and based upon competent evidence said decree of June 30, 1927, was by the District Court of the State of Oklahoma, duly vacated, set aside and held for naught. From that time to the death of J. M. Pearl, also known as Maurice O. W. Pearl, he and Musetta Wood Pearl, were husband and wife, and lived and cohabited together as such in the State of Oklahoma.

9.

That there is no law in Alaska authorizing the disposal of property by a holographic will and the only way provided by the laws and statutes of

Alaska for the making of a valid will are sections 4611, 4612 and 4640 Compiled Laws of Alaska, and neither of these statutes has been complied with, and the writing offered for probate herein is void and not sufficient as a will or testament under the laws of the District of Columbia, the State of Oklahoma or the Territory of Alaska.

Wherefore this petitioner prays this Honorable Court to set aside, vacate and hold for naught the order appointing Paul Greiman administrator, and for an order setting aside all other orders made herein including the order admitting to probate the writing filed therein as a will and for an order appointing Julian A. Hurley, administrator for the Territory of Alaska, of this estate and that the Court make an order setting this petition, contest and objections for hearing at a time that will allow sufficient time for the taking of depositions in the State of Oklahoma, and for such other and further relief as the Court may deem proper.

BYRON W. WOODS,
By BAILEY E. BELL,
His Attorney. [9]

United States of America,
Territory of Alaska—ss.

Bailey E. Bell, being first duly sworn, deposes and says: That he is attorney for Byron W. Woods, the petitioner above named; that he has read and knows the contents of the foregoing petition, and same is true as he verily believes; that he

makes this verification in behalf of Byron W. Woods for the reason that the said Byron W. Woods is not now in the Territory of Alaska, the place where said verification is made.

[Seal] BAILEY E. BELL.

Subscribed and sworn to before me this 27 day of December, 1945.

[N. P. Seal] J. G. RIVERS,
Notary Public in and for the Territory of Alaska.

My commission expires: 1-18-1946.

Service of foregoing Amended Petition acknowledged this 27th day of December 1945.

CECIL H. CLEGG,
Atty. for Administrator with will Annexed Paul Greiman

LETTERS OF ADMINISTRATION

State of Oklahoma,
Oklahoma County—ss.

Byron W. Wood is hereby appointed administrator of the estate of Maurice O. W. Pearl, Deceased.

Witness C. J. Blinn, Judge of the County Court of Oklahoma County, State of Oklahoma, with the seal thereof affixed, the 31st day of July A. D., 1945.

[Seal] ....

Judge of the County Court.

State of Oklahoma,
Oklahoma County—ss.

I, Byron W. Wood, do solemnly swear that I will perform according to law, the duties of administrator of the estate of Maurice O. W. Pearl Deceased, So help me God.

BYRON W. WOOD

Subscribed and sworn to before me, this 31st day of July, 1945.

[Seal] KATHRYN KEAHEY,
Notary Public County Judge—Court Clerk.

By ....
Deputy.

My commission expires: Nov. 16, 1946. [10]

[Endorsed]: No. 20,524, County Court, Oklahoma County, State of Oklahoma. Letters of Administration.

I, Cliff Myers, Court Clerk for Oklahoma County, Okla. hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the County Court Clerk's office of Oklahoma County, Okla., this 31st day of July, 1945.

CLIFF MYERS,
Court Clerk.

By OLA HOPE, Deputy.

[Seal]

EXHIBIT A

Filed: December 27, 1945. Eleanor M. Ely, U. S. Commissioner & Ex-Officio Probate Judge. [11]

In the Probate Court, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska

No. 1019

In the Matter of the Estate of
J. M. PEARL, DECEASED

MOTION TO DISMISS AMENDED PETITION OF BYRON W. WOOD FOR REMOVAL OF ADMINISTRATOR ETC.

Comes now Paul Greimann, Administrator with Will Annexed of the above entitled estate, appearing specially for the purpose of this Motion only, and respectfully moves the Court to dismiss the Amended Petition of Byron W. Wood for the removal of Administrator etc. upon the following grounds, namely:

1. That no Notice of said Amended Petition, or of any other Petition by said Byron W. Wood herein, has been given to this Administrator as required by Section 4371 of the Compiled Laws of Alaska, 1933, nor has said Amended Petition or any Citation been served upon said Administrator as required by the laws of the Territory of Alaska.

2. That it appears from the face of said Amended Petition that the petitioner herein, Byron W. Wood, has no interest whatever in said estate or the proceeds thereof, as required by the laws of the Territory of Alaska, entitling him to file any Petition or Amended Petition herein, and that he is incompetent to seek the relief asked for by him or any relief whatsoever.

3. That this Court has no jurisdiction of the subject matter of said Amended Petition or of the person of said Administrator.

4. That no legal grounds are stated in said Amended Petition for the removal of said Administrator, as required by said Section 4371, CLA 1933.

5. That no legal grounds are stated in said Amended Petition warranting the setting aside of the Order of this Court admitting to probate the Will of said decedent or of any other Order entered in these proceedings, and that said Court has no jurisdiction so to do.

6. That no grounds whatever are stated in said Petition warranting [12] this Court in refusing to settle, approve, and confirm the Final Account of said Administrator as filed herein.

7. That said Amended Petition is not signed by any person whatsoever.

This Motion is made and based upon all the files and records herein and upon all the proceedings heretofore had in the above entitled matter.

CECIL H. CLEGG,

Attorney for Administrator with Will Annexed Appearing Specially for the Purposes of this Motion only and for no other purpose.

Due service of the foregoing Motion, and receipt of a copy thereof, acknowledged December 28, 1945.

BAILEY E. BELL,

Attorney for Byron W. Wood, Petitioner

Filed: December 28, 1945. Eleanor M. Ely, U. S. Commissioner & Ex Officio Probate Judge. [13]

[Title of Probate Court and Cause.]

ORDER DENYING MOTION TO DISMISS AMENDED PETITION OF BYRON W. WOOD FOR REMOVAL OF ADMINISTRATOR ETC.

This cause coming on for hearing on the third day of January, 1946, on the motion of Cecil H. Clegg, Attorney for Administrator with Will Annexed appearing specially for the purposes of the motion only, to Dismiss Amended Petition of Byron W. Wood for removal of administrator etc., and Paul Greimann, Administrator with Will Annexed of the above entitled estate, appearing in person and by his Attorney, Cecil H. Clegg, and Byron W. Woods appearing by his attorney Bailey E. Bell, and the Court having heard the arguments of counsel, and being fully advised in the premises and having taken the matter under advisement until January 5, 1946,

It Is Hereby Ordered that the Motion To Dismiss Amended Petition of Byron W. Wood for Removal of Administrator Etc., be, and the same is hereby, denied.

Dated at Fairbanks, Alaska, this 5th day of January, 1946.

[Probate Court Seal] ELEANOR M. ELY,
United States Commissioner and ex-officio Probate Judge, Fairbanks Precinct.

[Endorsed]: Filed January 14, 1946.

(Entered in Volume 18 of Probate Records, Page 268) [14]

[Title of Probate Court and Cause.]

DEMURRER

Comes now Paul Greimann, Administrator with Will Annexed of the above entitled estate, and legatee under the Will of decedent above named, and, reserving all his rights acquired by his special appearance herein and without waiving the same, demurs to the Amended Petition of Byron W. Wood upon the ground that it appears from the face of said Amended Petition:

1. That this Court has no jurisdiction of the person of Paul Greimann, either as Administrator with Will Annexed of said estate or as such legatee.

2. That this Court has no jurisdiction of the various subjects set forth in said Amended Petition, or of either of them.

3. That said Amended Petition is multifarious and too sweeping to be entertained by a Court of Probate, and several unrelated alleged grounds of relief are improperly united therein.

4. That said petitioner, Byron W. Wood, has no interest whatever in said estate or the proceeds thereof, as required by the laws of Alaska, which entitles him to file any Petition or Amended Petition herein seeking the relief prayed for by him, or any relief whatsoever, and that he is incompetent to seek such relief.

5. That said petitioner, Byron W. Wood, is not an heir, legatee, devisee, creditor, or other person interested in said estate and has no standing in this Court.

6. That said Amended Petition does not state facts sufficient to entitle said petitioner, Byron W. Wood, to the relief prayed for, or any relief.

7. That said Amended Petition does not state facts sufficient to entitle said petitioner to an Order of this Court for the removal of the present Administrator. [15]

8. That said Amended Petition does not state facts sufficient to entitle said petitioner to an Order of this Court setting aside the Order of this Court admitting to probate the Will of said decedent, or any other Order entered in these proceedings.

9. That said Amended Petition does not state facts sufficient to warrant this Court in refusing to settle, approve, and confirm the Final Account of the present Administrator.

10. That said Amended Petition does not state facts sufficient to warrant this Court in refusing to adjudicate the heirs of said decedent in conformity with the terms of his Will and the intention of said testator.

11. That said Amended Petition does not state facts sufficient to warrant this Court in entering an Order herein holding said Will to be void and ineffectual as a Will.

12. That said Amended Petition does not state facts sufficient to warrant the Court in appointing Julien A. Hurley, or any other person, as Administrator of the Estate of said decedent in the Territory of Alaska.

13. That said Amended Petition was not filed within the time prescribed by law.

CECIL H. CLEGG,

Attorney for Paul Greimann, Administrator and legatee.

Due service of the foregoing Demurrer and receipt of a copy thereof acknowledged January 16th, 1946.

BAILEY E. BELL,

Attorney for Byron W. Wood, Petitioner.

Filed: January 17, 1946. Eleanor M. Ely, U. S. Commissioner & Ex Officio Probate Judge. [16]

No. 1019

In the Matter of the Estate of
J. M. PEARL, Deceased, Probate

January 17, 1946.

The demurrer of Paul Greimann, Administrator with Will Annexed of the above entitled estate, to the Amended Petition of Byron W. Wood having been filed this 17th day of January, 1946, and having been submitted to the court without argument,

It is Ordered that the said demurrer be, and the same is overruled.

Done this 17th day of January, 1946.

ELEANOR M. ELY,

United States Commissioner and ex officio Probate Judge.

(Filed for Record in Volume 18 of Probate, Page 509) [17]

[Title of Probate Court and Cause.]

APPLICATION FOR COMMISSION TO TAKE DEPOSITIONS TO THE PROBATE COURT, FAIRBANKS PRECINCT, FOURTH JUDICIAL DIVISION, TERRITORY OF ALASKA:

Comes now Bailey E. Bell, Attorney for the Petitioner and Contestant of the will in the estate of J. M. Pearl, deceased, as set forth in the above-entitled action and cause, and petition the above-entitled Court for the issuance of a commission directed to Maude A. Moore, a Notary Public in and for the State of Oklahoma, to take the testimony, upon written interrogatories, of the following material witnesses on the part of the petitioner and contestant, to-wit:

Byron W. Wood, residing in Council Hill, Oklahoma, and Lista L. Fitch and H. C. Fitch, of 620 West Washington Street, Oklahoma City, Oklahoma, upon the ground and for the reason that said witnesses reside in the State of Oklahoma; and to secure the personal attendance of such witnesses would be a burdensome expense to petitioner; and that your petitioners are conversant with the facts at issue in the above-entitled action and believe that the petitioner has a good cause of contest against the Will and in support of all of the allegations of the petition.

Dated at Fairbanks, Alaska, this 8th day of February, 1946.

BAILEY E. BELL,
Attorney for Petitioner and Contestant

[Title of Probate Court and Cause.]

OBJECTIONS TO ISSUANCE OF COMMISSION TO TAKE DEPOSITIONS

Comes now Paul Greimann, individually and as Administrator of the above entitled estate, and objects to the issuance of any Commission to take the depositions of any witnesses in the above entitled matter upon the following grounds:

1. Objects to the issuance of any Commission to take depositions of any witnesses upon the ground that the Compiled Laws of Alaska do not permit the issuance by any Probate Court in the Territory of Alaska of any Commission to take depositions of witnesses, and the issuance of a Commission and the taking of any depositions thereunder is unauthorized by any law.

2. Objects to the issuance of any Commission directed to Maude A. Moore, Notary Public, of Oklahoma City, Oklahoma, upon the ground that it is not shown she is a disinterested person, and upon the further ground that said Administrator is informed and believes that she is an employee of the Oklahoma attorney for Byron W. Wood, petitioner herein, and, therefore, has an interest in the result of this contest.

3. Objects to the issuance of any Commission to take the deposition of Byron W. Wood in Oklahoma City, Oklahoma, for the reason that said witness resides at Council Hill, Muskogee County, Oklahoma, which place is distant more than one hundred fifty miles from Oklahoma City aforesaid, and such

deposition, if taken, should be taken either at Council Hill or at Muskogee, the county seat of Muskogee County, before the Clerk of the County Court in and for Muskogee County, Oklahoma, which is distant not more than fifteen miles from Council Hill aforesaid.

CECIL H. CLEGG,
Attorney for Paul Greimann
aforesaid [19]

Due service of the foregoing Objections, and receipt of a copy thereof, acknowledged February 19, 1946.

BAILEY E. BELL, NV
Attorney for Byron W. Wood,
Petitioner

[Endorsed]: Filed February 19, 1946.

[Title of Probate Court and Cause.]

ORDER OVER-RULING OBJECTIONS TO ISSUANCE OF COMMISSION TO TAKE DEPOSITIONS, ETC.

The hearing on the objections filed February 19, 1946, by the attorney for Paul Greimann, individually and as Administrator of the above entitled estate, having been held on the 26th of February, Cecil H. Clegg and Bailey E. Bell appearing, and the Court having continued the matter until this date,

It Is Ordered and Adjudged that the following

objections to the Issuance of Commission to Take Depositions be, and the same are over-ruled:

Objection No. 1 to the Issuance of any Commission to Take Depositions, etc.;

Objection No. 3 to the Issuance of any Commission to Take the Deposition of Byron W. Wood in Oklahoma City, Oklahoma, etc.;

It is Further Ordered and Adjudged that the following objections to Direct Interrogatories Proposed to be Propounded to Byron W. Wood be, and the same are over-ruled:

Objection No. 2, to Interrogatory No. 3, etc.;

Objection No. 5, to Interrogatory No. 6, etc.;

Objection No. 7, to Interrogatory No. 8, etc.;

Objection No. 8, to Interrogatory No. 9, etc.;

Objection No. 10, to Interrogatory No. 13, etc.;

Objection No. 11, to Interrogatory No. 17, etc.;

It Is Further Ordered and Adjudged that the following objections to Direct Interrogatories Proposed to be Propounded to H. C. Fitch be, and the same are over-ruled:

Objection No. 6, to Interrogatory No. 7, etc.;

Objection No. 7, to Interrogatory No. 9, etc.;

It Is Further Ordered and Adjudged that the following objections to Direct Interrogatories Pro-

posed to be Propounded to Lista L. Fitch be, and the same are over-ruled:

Objection No. 6, to Interrogatory No. 7, etc.;

Objection No. 7, to Interrogatory No. 9, etc.;

Objection No. 8, to Interrogatory No. 10, etc.;

Done this 28th day of February, 1946.

[Probate Court Seal] ELEANOR M. ELY,
United States Commissioner and ex officio Probate Judge.

[Endorsed]: Filed February 28, 1946.

(Entered in Volume 18 of Probate Records, Page 397) [22]

[Title of Probate Court and Cause.]

ANSWER

Comes now Paul Greimann, Administrator with Will Annexed of the above entitled estate, and legatee under the Will of decedent above named, and, for answer to the Amended Petition filed herein by Byron W. Wood, admits, denies, and alleges as follows:

I.

Denies each and every allegation contained in paragraph 1 of said Amended Petition, and the whole thereof, and, in this behalf, alleges that on the 26th day of September, 1931, said J. M. Pearl was, and had been for many years prior thereto, a bona fide resident and inhabitant of the Territory of Alaska and had his legal domicile therein, and

had no property, real or personal, in the District of Columbia.

II.

Denies each and every allegation contained in paragraph 2 of said Amended Petition, and the whole thereof, except that he admits he is not a relative of J. M. Pearl, deceased.

III.

Denies each and every allegation contained in paragraph 3 of said Amended Petition, and the whole thereof, except that he admits J. M. Pearl was well known at Fairbanks, Alaska.

IV.

Denies each and every allegation contained in paragraph 4, and the whole of said paragraph, except that he admits he is no relation to the above named decedent and was never adopted by said decedent.

V.

Denies each and every allegation contained in paragraph 5, and the whole of said paragraph.

VI.

Denies each and every allegation contained in paragraph 6, and the whole of said paragraph, except the allegation that said J. M. Pearl died on July 8, 1944. [23]

VII.

Denies each and every allegation contained in paragraph 7, and the whole of said paragraph.

VIII.

Denies each and every allegation contained in paragraph 8, and the whole of said paragraph, and, in this behalf, alleges that at the time of his death, to wit, on July 8, 1944, said J. M. Pearl was, and for many years prior thereto had been, a bona fide resident and inhabitant of the Territory of Alaska and had his legal domicile therein.

IX.

Denies each and every allegation contained in paragraph 9, and the whole of said paragraph.

Further answering said Amended Petition, Paul Greimann as Administrator aforesaid and for himself as legatee under said Will of said J. M. Pearl, deceased, alleges as follows:

I.

That said Paul Greimann, ever since he was of the age of eighteen years, in Chicago, Illinois, had been the intimate friend, and for many years in Fairbanks, Alaska, was, the business associate, of said decedent, J. M. Pearl; that this close friendship continued unbroken up to the time decedent left Fairbanks in December, 1941; that they worked and lived together in Chicago, Illinois, prior to coming to Alaska on or about September 1, 1923; that for many years in the town of Fairbanks, Alaska, they were equal partners in the conduct of a garage business under the name and style of Pearl & Pearl; that from the time said decedent and said Paul Greimann arrived in

Fairbanks, Alaska, on or about September 1, 1923, and for many years thereafter, said Paul Greimann was commonly known in Fairbanks, Alaska, as Paul Greimann Pearl, due to the fact that said decedent usually addressed him as "Son" and requested him to use the name of "Pearl"; that said decedent was approximately thirty years older than said Paul Greimann.

II.

That said decedent during the month of December, 1941, left Fairbanks, Alaska, to secure needed medical attention in the States; that he never abandoned his permanent domicile in the Territory of Alaska, and, upon leaving the Territory at the time aforesaid, he [24] fully intended to return to Alaska, and continued in such intention as long as he lived; that shortly after leaving Fairbanks, Alaska, he suffered a stroke of paralysis and became mentally incompetent and was thereby prevented from returning to his home in Fairbanks, Alaska.

Wherefore, your Administrator and legatee under said Will prays that said Amended Petition of Byron W. Wood be denied and dismissed as to all matters and things for which relief is sought and that said Administrator and legatee have his Final Account as such Administrator approved and confirmed, and that the proceeds of said estate be adjudicated to him and Robert Gallagher as the legal beneficiaries under said Will of decedent, and for his costs and disbursements and such other and

further relief as to this Court may seem meet and just in the premises.

CECIL H. CLEGG,

Attorney for Paul Greimann, Administrator with Will Annexed of the Estate of J. M. Pearl, deceased, and legatee under the Will of said decedent.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Paul Greimann, being first duly sworn, on oath deposes and says; I am the Administrator with Will Annexed of the Estate of J. M. Pearl, deceased, and am one of the legatees named in the Will of said decedent; that I have read the foregoing Answer, know the contents thereof, and the same is true as I verily believe.

PAUL GREIMANN,

Subscribed and sworn to before me this 17th day of January, 1946.

[N. P. Seal] CECIL H. CLEGG,

Notary Public for Alaska

My commission expires April 30th, 1946.

Due service of the foregoing Answer, and receipt of a copy thereof, acknowledged January 21st, 1946.

BAILEY E. BELL,

Attorney for Byron W. Wood, Petitioner.

[Endorsed]: Filed January 21, 1946. [25]

[Title of Probate Court and Cause.]

REPLY

Comes now the petitioner, Byron W. Wood, and for Reply to the Answer filed by Paul Greimann, Administrator with Will Annexed and alleges and states as follows to-wit:

I.

He denies each and every allegation of affirmative matter set forth in paragraph I of the Answer, and the whole thereof.

II.

This Petitioner denies that J. M. Pearl was at the time of his death, and for many years prior thereto, a bona fide resident and inhabitant of the Territory of Alaska, and denies that his legal domicile was in the Territory of Alaska.

III.

This Petitioner is not sufficiently advised to form a belief as to the truth set forth in paragraph I on page 2 of said Answer, and the paragraph II on page 3 of said answer, and therefore denies each and every allegation therein contained, and the whole thereof.

BAILEY E. BELL,
Attorney for Petitioner.

United States of America,
Territory of Alaska—ss.

Bailey E. Bell, being first duly sworn, deposes and says: That he is the attorney for Byron W. Wood, the petitioner above named; and that he has

read and knows the contents of the foregoing petition, and same is true as he verily believes; that he makes this verification in behalf of Byron W. Wood for the reason that the said Byron W. Wood is not now in the Territory of Alaska, the place where said verification is made.

BAILEY E. BELL,

Subscribed and sworn to before me this 8th day of February, 1946.

[N. P. Seal] J. G. RIVERS,

Notary Public in and for the Territory of Alaska.

My Commission Expires: 2/18/1946. [26]

Service of foregoing reply acknowledged this 8th day of February, 1946.

CECIL H. CLEGG,

Attorney for Paul Greiman,
Administrator.

[Endorsed]: Filed February 8, 1946. [27]

[Title of Probate Court and Cause.]

ORDER and DECREE REVOKING ORDER OF MARCH 6, 1945, ADMITTING TO PROBATE A CERTAIN DOCUMENT DATED 9/26/31, and ENVELOPE ATTACHED THERETO, AS LAST WILL AND TESTAMENT OF DECEDENT.

This matter coming on regularly for hearing on June 17, 1946, before the above entitled Court upon the issues raised by the Amended Petition of Byron W. Wood, of Council Hill, Oklahoma, filed herein,

the Answer thereto of Paul Greimann, Administrator with Will Annexed of the above entitled estate, and the Reply of said petitioner. Said petitioner, Byron W. Wood, was represented by his attorney, Bailey E. Bell, and said Administrator appeared in person and was represented by his attorney, Cecil H. Clegg. Certain oral and documentary proofs and evidence was admitted by the respective parties, and arguments were had thereon. Whereupon said Court took said cause under advisement until the 16th day of July, 1946, at the hour of three o'clock P. M., at which time said Court announced its decision orally, and does now, in accordance therewith, find as follows:

1. That said decedent, J. M. Pearl, died on July 8, 1944, in the State of Oklahoma, and left a certain document, dated 9/26/31 at Washington, D. C., signed by said decedent and written in his own handwriting, purporting to be his last will and testament, which said document was mailed to said Paul Greimann from Washington, D. C. on September 27, 1931, in an envelope addressed in the handwriting of said decedent, and which said document, together with said envelope, was on March 6, 1945, admitted to probate herein as the last will and testament of said J. M. Pearl, deceased.

2. That on the 18th day of December, 1945, one Byron W. Wood, of Council Hill, Oklahoma, filed herein a Petition for the removal of said Greimann as Administrator with Will Annexed of said estate and to set aside all Orders made by this Court in this proceeding, including the Order admitting to

probate the document hereinabove [28] described; and that thereafter, on December 27, 1945, said Byron W. Wood filed herein an Amended Petition of the same general tenor and character as his original Petition hereinabove referred to.

3. That the purported Will heretofore admitted to probate in these proceedings is not an absolute last will and testament of said decedent, J. M. Pearl, but is a conditional Will and is of no legal force or effect and is not entitled to probate as the last will and testament of said J. M. Pearl.

4. That an Order should be made herein revoking that certain Order entered herein on March 6, 1945, admitting to probate said document above mentioned as the last will and testament of said J. M. Pearl, deceased, and denying, in all other respects, the Amended Petition of said Byron W. Wood.

Now, Therefore,

It Is Hereby Ordered, Adjudged, and Decreed That the following portion of that certain Order made and entered herein on the 6th day of March, 1945, entitled "Order Admitting Will to Probate and appointing Administrator with Will Annexed", to wit:

> "It Is Hereby Ordered, Adjudged, and Decreed That the document hereinabove mentioned, and the envelope thereto attached, be, and is hereby, admitted to probate as the Last Will and Testament of said J. M. Pearl, deceased."

be, and the same is hereby, set aside and annulled, and that, in all other respects, the Amended Petition of Byron W. Wood filed herein on December 27, 1945, be, and the same is hereby, denied.

Dated at Fairbanks, Alaska, this 24th day of July, 1946.

[Probate Court]

[Seal] ELEANOR M. ELY,
United States Commissioner and ex officio Probate Judge, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska.

[Endorsed]: Filed July 24, 1946. [29]

[Title of Probate Court and Cause.]

NOTICE OF APPEAL

To Byron W. Wood, Petitioner, and Bailey E. Bell, his attorney:

You, and each of you, will please take notice that Paul Greimann, individually and as Administrator with the Will Annexed of the Estate of J. M. Pearl, deceased, has appealed, and does hereby appeal, to the Honorable District Court for the Territory of Alaska, Fourth Judicial Division, sitting at Fairbanks, from that certain Order and Decree made and entered by the above entitled Probate Court in the above entitled proceedings on the 24th day of July, 1946, wherein said Probate Court found

the Will theretofore admitted to probate on March 6, 1945, as the last will and testament of said decedent, J. M. Pearl, to be a conditional Will and of no legal force or effect and not entitled to probate as the last will and testament of said decedent, and wherein said Probate Court set aside, annulled, and revoked that part of said Order of March 6, 1945, admitting said Will to probate herein, and that he also appeals from all adverse orders and rulings of said Probate Court made in said proceedings as more particularly set forth in the Exceptions filed herein by appellant.

Dated at Fairbanks, Alaska, this 25th day of July, 1946.

CECIL H. CLEGG,
Attorney for Appellant, Paul Greimann, Individually and as Administrator with Will Annexed of the Estate of J. M. Pearl, deceased.

Due service of the foregoing Notice of Appeal, and receipt of a copy hereof, acknowledged July 26th, 1946.

BAILEY E. BELL,
Attorney for Petitioner Byron W. Wood.

PAUL GREIMANN,
Appellant.

[Endorsed]: Filed July 26, 1946. [30]

[Title of Probate Court and Cause.]

EXCEPTIONS OF PAUL GREIMANN, ADMINISTRATOR, TO DECREE REVOKING ORDER ADMITTING TO PROBATE A CERTAIN DOCUMENT AS DECEDENT'S LAST WILL AND TESTAMENT, AND ADVERSE INTERMEDIATE RULINGS

Comes now Paul Greimann, individually and as Administrator with Will Annexed of the above entitled estate, hereinafter designated "Appellant", and objects and excepts to the Order and Decree Revoking Order of March 6, 1945, Admitting Will to Probate, made and entered herein on July 24, 1946, and all adverse intermediate orders in the proceedings heretofore had before said Court in the above entitled cause, in the following particulars, namely:

1. He excepts to the action of said Probate Court in refusing to dismiss the Amended Petition of Byron W. Wood and entering an Order herein on January 5, 1946, denying appellant's Motion to Dismiss Amended Petition filed in said Court on December 28, 1945, upon the ground that the ruling of said Court was not authorized by law and was against the law and contrary thereto, to which ruling appellant duly excepted.

2. He excepts to the action of said Probate Court in refusing to sustain the Demurrer of Appellant to the Amended Petition of said Byron W. Wood upon the ground that said Demurrer was

well founded in law and the ruling of said Probate Court was against the law in the premises and contrary thereto, to which ruling appellant duly excepted.

3. He excepts to the action of said Probate Court in requiring appellant to answer said Amended Petition of said Byron W. Wood upon the ground that said Court was without jurisdiction so to do, and said ruling was not authorized by law but was contrary thereto, to which ruling appellant duly excepted. [31]

4. He excepts to the action of said Probate Court in overruling the objections of appellant to the issuance of a Commission to take the depositions of witnesses residing outside of Alaska, viz., Byron W. Wood of Council Hill, Oklahoma, Lista L. Fitch and H. C. Fitch, both residing at 620 West Washington Street, Oklahoma City, Oklahoma, upon the ground that said Court has no authority in law to issue a Commission to take depositions of witnesses outside of Alaska, and had no jurisdiction to enter said Order and that the same was against the law and contrary thereto, to which ruling appellant duly excepted.

5. He excepts to the action of said Probate Court in overruling the objections of appellant to the introduction by said Byron W. Wood and in behalf of said Wood upon the hearing of the respective depositions of said witnesses specified in paragraph 4 hereof, upon the ground that the ruling of said Court was unauthorized by law and con-

trary thereto, to which ruling appellant duly excepted.

6. He excepts to the Order and Decree entered in said cause by said Probate Court on July 24, 1946, setting aside and annulling that certain portion of the Order of said Court made and entered in said cause on March 6, 1945, admitting to probate the document mentioned in said Order, and the attached envelope, as the Last Will and Testament of J. M. Pearl, deceased, upon the ground that said Order and Decree was made and entered against the law and contrary thereto, to which Order and Decree appellant duly excepted.

7. He excepts to the finding numbered 3 contained in said Order and Decree of July 24, 1946, to wit: "3. That the purported Will heretofore admitted to probate in these proceedings is not an absolute last will and testament of said decedent, J. M. Pearl, but is a conditional will and is of no legal force or effect and is not entitled to probate as the last will and testament of said J. M. Pearl", upon the ground that the same was made and entered against the law and the evidence in the premises, and contrary thereto, to which finding appellant duly excepted.

Wherefore, appellant prays for a Judgment and Decree of the appellate Court reversing said cause and sustaining the validity of the last will and testament of said decedent heretofore admitted to probate [32] by the Order of said Probate Court on March 6, 1945, and for such other and further re-

lief as to said appellate Court may seem just and equitable in the premises.

CECIL H. CLEGG,
Attorney for Appellant.

Due service of the foregoing Exceptions, and receipt of a copy thereof, acknowledged July 26th, 1946.

BAILEY E. BELL,
Attorney for Petitioner
Byron W. Wood.

[Endorsed]: Filed July 26, 1946. [33]

5524

In the Matter of the Estate of
J. M. PEARL, Deceased.

ORDER TO DRAW JUDGMENT

The trial of this cause on appeal from the Probate Court, Fairbanks Precinct, having been had on the 2nd day of October, 1946, and the matter having been taken under advisement, the Court, now being fully advised in the premises, announced that he found for the appellant and directed that counsel for the appellant draw a Judgment in accordance with the Opinion filed in this cause.

* * *

Oct. 9, 1946.

Entered in Court Journal No. 34, Page 170. [61]

In the District Court for the Territory of Alaska, Fourth Division

No. 5524

In the Matter of the Estate of
J. M. PEARL, Deceased.

DECREE

Be It Remembered That this cause came on to be heard before the above entitled Court on the 2nd day of October, 1946, appellant, Paul Greimann, individually and as Administrator with Will Annexed of the Estate of J. M. Pearl, deceased, appearing in person and by his attorney, Cecil H. Clegg, and appellee, Byron W. Wood, petitioner, appearing by his attorney, Warren A. Taylor. Appellant presented certain oral and documentary testimony and evidence and rested, and petitioner Byron W. Wood, as appellee, offered none. Thereupon said cause was argued before said Court by respective counsel and was taken under advisement by said Court. Thereafter, on October 9, 1946, said Court, having considered the arguments of counsel and the law and evidence upon the issue of whether or not the letter of decedent hereinafter described constitutes a contingent or absolute Will, filed its written opinion herein holding in favor of appellant and against appellee-petitioner.

Wherefore, by virtue of the law and the premises,

It Is Hereby Ordered, Adjudged, and Decreed That the letter dated 9-26-31 written by J. M. Pearl, decedent above named, in his own handwriting,

signed by him, and mailed by him from Washington, D. C., on September 27, 1931, addressed to Paul Greimann, Fairbanks, Alaska, is the true and valid Last Will and Testament of said decedent, J. M. Pearl, and is entitled to probate as such under the laws of Alaska, as heretofore adjudicated on the 6th day of March, 1945, [62] by the Probate Court for the Fairbanks Precinct, Alaska; and said Probate Court is hereby ordered to reinstate said adjudication of March 6, 1945;

It Is Further Ordered, Adjudged, and Decreed That the Order and Decree of said Probate Court made and entered on the 24th day of July, 1946, in the above entitled probate proceeding pending in said Probate Court, numbered 1019, revoking, vacating, and setting aside said Order of March 6, 1945, admitting said letter to probate as the last will and testament of said decedent, J. M. Pearl, upon the ground that said letter was invalid as an absolute will of decedent and was merely a contingent or conditional Will in its terms and intent, be, and the same is hereby, vacated, set aside, and held for naught.

It Is Further Ordered, Adjudged, and Decreed That the finding and decree of said Probate Court to the effect that said letter is a conditional will and is of no legal force or effect as a last will and testament and, therefore, not entitled to probate as the last will and testament of said J. M. Pearl, deceased, be, and the same is hereby, reversed and set aside.

It Is Further Ordered and Adjudged That said

appellant, Paul Greimann, have and recover his costs and disbursements upon said appeal proceeding, taxed by the Clerk of this Court at the sum of $63.25.

It Is Further Ordered That the Clerk of this Court deliver to said Probate Court a true copy of this Decree, duly certified by said Clerk.

Dated at Fairbanks, Alaska, this 14th day of October, 1946.

HARRY E. PRATT,
District Judge.

Receipt of a copy of the foregoing Decree acknowledged October 11, 1946.

WARREN A. TAYLOR
Attorney for Byron W. Wood,
Appellee.
(M)

Entered in Court Journal No. 34, Page 171.

[Endorsed]: Filed Oct. 14, 1946. [63]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Byron W. Wood, Council Hill, Oklahoma.

Name and Address of Appellant's Attorneys: Bailey E. Bell, Fairbanks, Alaska; Warren A. Taylor, Fairbanks, Alaska.

Name and Address of Appellee: Paul Greimann, Fairbanks, Alaska.

Name and Address of Appellee's Attorney: Cecil H. Clegg, Fairbanks, Alaska.

Notice Is Hereby Given that Byron W. Wood, petitioner in the above entitled cause does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit of the United States of America, from a Decree entered in the above entitled action on the 14th day of October, 1946, and for grounds of appeal allege as follows:

I.

That the Court erred in decreeing a letter dated 9/26/31, written by J. M. Pearl to be the true and valid Last Will and Testament of J. M. Pearl, Deceased, and entitled to probate under the laws of the Territory of Alaska.

II.

That the Court erred in vacating and setting aside that certain order of the Probate Court in the said cause, which said order of the probate Court held that the letter, dated 9-26-31 written by J. M. Pearl was a contingent or conditional will and not entitled to probate as the Last Will and Testament of the said decedent, J. M. Pearl. [64]

III.

That the Court erred in reversing and setting aside the findings and decree of said probate court to the effect that the said letter was a conditional or contingent will and was of no legal force and

effect as the Last Will and Testament of J. M. Pearl.

Dated at Fairbanks, Alaska, this 18th day of October 1946.

/s/ WARREN A. TAYLOR,
Of Plaintiff's Attorneys.

Service of copy acknowledged this 21st day of October, 1946.

CECIL H. CLEGG, lpc
Attorney for Paul Greimann.

[Endorsed]: Filed Oct. 21, 1946. [65]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The petitioner in the above entitled cause, considering himself aggrieved by the decree entered in the said cause on the 14th day of October, 1946, in favor of the Administrator of the Estate of J. M. Pearl, Deceased, which said decree reversed and set aside the Order and Decree of the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct which found and decreed that a certain letter written by the decedent, J. M. Pearl, was not a true and valid will of deceased; and which order and decree of said probate court revoked it's previous order admitting the said letter to probate as the Last Will and Testament of deceased. That

the District Court for the Territory of Alaska further ordered and decreed that the said letter was a true and valid will of the decedent, J. M. Pearl, and entitled to probate under the laws of the Territory of Alaska. By said Decree the issues were determined in favor of the Administrator of said Estate of Decedent and against the petitioner and appellant, Byron W. Wood.

The petitioner having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified and set forth, does respectfully pray that his said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said decree was made and entered, be duly authenticated by the Clerk of this Court, and sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; and this said petitioner, Byron W. Wood, does further pray that said decree aforementioned be corrected, set aside, reversed and a new trial ordered, and that the Court fix the amount of appeal bond to be filed herein. [66]

Dated at Fairbanks, Alaska, this 19th day of December, 1946.

/s/ WARREN A. TAYLOR,
Of Attorneys for Petitioner.

[Endorsed]: Filed Dec. 19, 1946. [67]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING APPEAL BOND

On this 2nd day of October, 1946, the same being one of the days of the General March, 1946, Term of this Court, this cause came on regularly to be heard upon the petition of Byron W. Wood for the allowance of an appeal in behalf of the said petitioner from the decree entered in the said cause on the 14th day of May, 1946, which said decree reversed a decree of the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, in the said matter, and also fixing the amount of appeal bond on the said appeal, and the place of hearing said appeal, and the said Court being fully advised in the premises it hereby finds that the amount of the appeal bond should be Two Hundred Fifty ($250.00) Dollars, Now, Therefore,

It Is Hereby Ordered that the appeal of said petitioner from the decree entered herein on the 14th day of October, 1946, be, and the same is allowed, to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of records, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said decree appealed from is based, be transferred, duly authenticated to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before thirty (30) days from this date, to be heard at San Francisco, California, and

It Is Further Ordered that the amount of the Appeal Bond be, and is hereby fixed at the sum of $250.00; said bond to be submitted and approved by the undersigned Judge of this Court; and

It Is Further Ordered that in preparing and printing the record on appeal in said cause, the title of the Court and cause shall be printed on the first page of said record, and that thereafter it may be omitted, and, in place thereof, the words "Title of Court [68] and Cause" may be inserted, and that all endorsements on all papers may be omitted except the Clerk's filing marks and admission of service.

Done in Chambers on this 19th day of December, 1946.

HARRY E. PRATT,
District Judge.

Entered in Court Journal Dec. 19, 1946, No. 34, Page 314-315.

[Endorsed]: Filed Dec. 19, 1946. [69]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents: That we, Byron W. Wood, as principal, and Gradelle Leigh and Jack Allman as sureties, are held and firmly bound unto the United States in the sum of $250.00, to be paid to the United States of America; to which

payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 19th day of December, 1946.

Whereas, lately at a District Court of the United States for the Fourth Division of the Territory of Alaska, in a suit pending in said Court in which Byron W. Wood was petitioner, and Paul Greimann, as administrator of the Estate of J. M. Pearl, was respondent, a judgment was rendered against the said petitioner in said matter, and the said petitioner having filed in said Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of the above obligation is such: That if the said Byron W. Wood shall prosecute said appeal to effect, and to pay all costs that may be taxed against him, if for any reason the appeal is dismissed, or if the judgment is affirmed, then in that event the above obligation to be void; otherwise to remain in full force and effect.

Signed, sealed and acknowledged this 19th day of December, 1946.

/s/ BYRON M. WOOD,
By /s/ WARREN A. TAYLOR,
Attorney,
Principal.

/s/ JACK ALLMAN, (LS)
/s/ GRADELLE LEIGH (LS)

United States of America,
Territory of Alaska,
Fourth Division—ss.

Gradelle Leigh and Jack Allman, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a freeholder in the Territory of Alaska and is worth the sum of $500.00, exclusive of property exempt from execution, over and above all debts and liabilities.

/s/ JACK ALLMAN,
/s/ GRADELLE LEIGH.

Subscribed and sworn to before me this 19th day of December, 1946.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public for Alaska.

My commission expires 8/11/47.

Approved this 21st day of February, 1947.

HARRY E. PRATT,
District Judge.

[Endorsed]: Filed Dec. 19, 1946. [71]

In the United States Circuit Court of Appeals for the Ninth Circuit
At San Francisco, California
No. 5524

In the Matter of the Estate of
J. M. PEARL, Deceased.

ORDER EXTENDING TIME TO FILE, RECORD AND DOCKET CAUSE ON APPEAL

On motion of the appellant in the above entitled

cause, by Warren A. Taylor, one of his attorneys, for an order extending the time to file, record and docket the said cause on appeal in this court, it appears to this Court that by reason of the absence of counsel from the Territory of Alaska, and the absence of the District Judge for the Territory of Alaska, Fourth Division from the Territory of Alaska renders it impossible for the said cause to be filed, recorded and docketed in this Court within the time allowed by law; and the Court being fully advised in the premises and good cause appearing therefor:

It Is Hereby Ordered that the time within which the record on appeal in this case shall be deposited and filed in this Court with the Clerk thereof, and said cause docketed therein, be, and the same is extended and enlarged to and including the 1st day of March, 1947.

Dated at San Francisco, California, this 8th day of January, 1947.

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed C.C.A. Jan. 8, 1947. Paul P. O'Brien, Clerk.

[Endorsed]: Filed D.C. Feb. 6, 1947. John B. Hall, Clerk; by Olga T. Steger, Deputy. [72]

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5524

In the Matter of the Estate of
J. M. PEARL, Deceased.

ASSIGNMENT OF ERRORS

Comes now Byron W. Wood of Council Hill, Oklahoma, a full brother of the deceased, J. M. Pearl, and one of the heirs at law, and for Assignment of Errors in this case alleges and states:

I.

That the Court erred in taking jurisdiction in this case as on appeal for the reason that the judgment in the probate court of July 24, 1946, holding the letter as contingent and not a final will, had become final and no appeal was properly taken therefrom.

II.

That the Court erred in taking jurisdiction of this case as on appeal when no appeal was properly taken from the Judgment and Decree of the Probate Court under date of July 24, 1946, by anyone having authority or right to take an appeal.

III.

That the Court erred in taking jurisdiction in this case as if a proper appeal had been taken in that the record filed in this case in the United States District Court for the Territory of Alaska, Fourth Judicial Division, was insufficient to confer on said Court appellate jurisdiction in this to-wit: The

record contemplated by the Compiled Laws of Alaska, 1933, to be filed in the United States District Court on Appeals, in Probate cases Chapter CLIV Section 4571, 4572, 4573 and 4574 was never complied with as [73] the record did not contain the following documents and instruments upon which the United States Commissioner based her judgment of July 24, 1946 on, to-wit:

a. The Depositions of Byron W. Wood, Lesta L. Fitch and H. C. Fitch taken in Oklahoma City, Oklahoma, in this cause in which it was established by the uncontradicted testimony that Mr. J. M. Pearl, now deceased, was living with his wife in Oklahoma City for quite some time before he died.

b. The Certified copy of the judgment of the District Court of Oklahoma County, Oklahoma, showing that the divorce decree between the now deceased, J. M. Pearl, and Musetta Wood Pearl, his wife, had been vacated and set aside, restoring them as man and wife; which decree was dated 7th day of May, 1942;

c. Certified and Authenticated copy of the Laws of the District of Columbia as introduced in the trial before the United States Commissioner in this case; which acts controlled the making of wills in the District of Columbia.

d. The Certified copy of the death certificate.

e. The Certified copies of the Letters of Administration issued to Byron W. Wood, by

the County Court of Oklahoma County, Oklahoma, in the estate of Maurice O. W. Pearl, who it is shown to be the same man as J. M. Pearl, dated in Oklahoma County July 31, 1945.

IV.

The Court further erred in making an order reversing the judgment and order made by the United States Commissioner Ex-Officio Probate Judge on July 24, 1946, in which the said Probate Judge made the following findings, judgment and order to-wit:

> That the purported Will heretofore admitted to probate in these proceedings is not an absolute last will and testament of said decedent, J. M. Pearl, but is a conditional Will and is of no legal force or effect and is not entitled to probate as the last well and testament of said J. M. Pearl. [74]
>
> That an Order should be made herein revoking that certain Order entered herein on March 6, 1945, admitting to probate said document above mentioned as the last will and testament of said J. M. Pearl, deceased, and denying, in all other respects, the Amended Petition of said Byron W. Wood.

Now, Therefore,

It Is Hereby Ordered, Adjudged, and Decreed That the following portion of that certain Order made and entered herein on the 6th day of March, 1945, entitled "Order Admitting Will to Probate and appointing Administrator with Will Annexed", to-wit:

"It Is Hereby Ordered, Adjudged, and Decreed That the document hereinabove mentioned, and the envelope thereto attached, be, and is hereby, admitted to probate as the Last Will and Testament of said J. M. Pearl, deceased."

be, and the same is hereby, set aside and annulled, and that, in all other respects, the Amended Petition of Byron W. Wood filed herein on December 27, 1945, be, and the same is hereby, denied.

Dated at Fairbanks, Alaska, this 24th day of July, 1946."

[Probate Court Seal] ELEANOR M. ELY,
United States Commissioner and ex-officio Probate Judge, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska.

Filed: July 24, 1946. Eleanor M. Ely, U. S. Commissioner & Ex-Officio Probate Judge.

V.

The Court further erred in making and entering the Decree on October 14, 1946, which is as follows:

"No. 5524

DECREE

Be It Remembered That this cause came on to be heard before the above entitled Court on the 2nd day of October, 1946, appellant, Paul Greimann, individually and as Administrator with Will Annexed of the Estate of J. M. Pearl, deceased, appearing in person and by his attorney, Cecil H. Clegg, and appellee, Byron W.

Wood, petitioner, appearing by his attorney, Warren A. Taylor. Appellant presented certain oral and documentary testimony and evidence and rested, and petitioner, Byron W. Wood, as appellee, offered none. Thereupon said cause was argued before said Court by respective counsel and was taken under advisement by said Court. Thereafter, on October 9, 1946, said Court, having considered the arguments of counsel and the law and evidence upon the issue of whether or not the letter of decedent hereinafter described constitutes a contingent or absolute Will, filed its written opinion herein holding in favor of appellant and against appellee-petitioner.

Wherefore, by virtue of the law and the premises,

It Is Hereby Ordered, Adjudged, and Decreed That the letter dated [75] 9-26-31 written by J. M. Pearl, decedent above named, in his own handwriting, signed by him, and mailed by him from Washington, D. C., on September 27, 1931, addressed to Paul Greimann, Fairbanks, Alaska, is the true and valid Last Will and Testament of said decedent, J. M. Pearl, and is entitled to probate as such under the laws of Alaska, as heretofore adjudicated on the 6th day of March, 1945, by the Probate Court for the Fairbanks Precinct, Alaska; and

It Is Further Ordered, Adjudged, and Decreed That the Order and Decree of the said Probate Court made and entered on the 24th

day of July, 1946, in the above entitled probate proceeding pending in said Probate Court, numbered 1019, revoking, vacating, and setting aside said Order of March 6, 1945, admitting said letter to probate as the last will and testament of said decedent, J. M. Pearl, upon the ground that said letter was invalid as an absolute will of decedent and was merely a contingent or conditional Will in its terms and intent, be, and the same is hereby, vacated, set aside, and held for naught.

It Is Further Ordered, Adjudged, and Decreed That the finding and decree of said Probate Court to the effect that said letter is a conditional will and is of no legal force or effect as a last will and testament and, therefore, not entitled to probate as the last will and testament of said J. M. Pearl, deceased, be, and the same is hereby, reversed and set aside.

It Is Further Ordered and Adjudged That said appellant, Paul Greimann, have and recover his costs and disbursements upon said appeal proceeding, taxed by the Clerk of this Court at the sum of $.........

It Is Further Ordered That the Clerk of this Court deliver to said Probate Court a true copy of this Decree, duly certified by said Clerk.

Dated at Fairbanks, Alaska, this 14th day of October, 1946.

....

District Judge.

For all of which Byron W. Wood believes that he has been denied a right that he is entitled to, and denied a fair trial, and that the judgment and decree in the United States District Court for the Territory of Alaska, Fourth Judicial Division, is an error and should be reversed. Therefore prays an appeal to the Ninth Circuit Court of Appeals of the United States of America in this cause.

WARREN A. TAYLOR and
BAILEY E. BELL,

By BAILEY E. BELL,
Attorneys for Byron W. Wood, Appellant.

[Endorsed]: Filed Feb. 6, 1947. [76]

[Title of District Court and Cause.]

RETURN

Received from Bailey E. Bell, attorney for Appellant, copy of the Assignment of Errors and Bill of Exceptions in the matter of the Estate of J. M. Pearl, deceased, No. 5524, and served each of them on Paul G. Greimann in person in Fairbanks, Alaska, on 6th day of February, 1947.

Dated at Fairbanks, Alaska, this 7th day of February, 1947.

STANLEY J. NICHOLS,
United States Marshal.

By /s/ E. A. TONSETH,
Office Deputy.

[Endorsed]: Filed Feb. 7, 1947. [77]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Byron W. Woods respectfully presents the following Bill of Exceptions for allowance and settlement upon the appeal taken from the rulings, orders and judgment of the Court as set forth in this Bill of Exceptions and as set forth in the Assignmentof Errors and Notice of Appeal filed herein, the first of which this Appellant complains is as follows:

I.

That the Court erred in taking jurisdiction in this case as on appeal for the reason that the judgment in the probate court on July 24, 1946, holding the letter as contingent and not a final will, had become final and no appeal was properly taken therefrom.

II.

That the Court erred in taking jurisdiction of this case as on appeal when no appeal was properly taken from the Judgment and Decree of the Probate Court under date of July 24, 1946, by anyone having authority or right to take an appeal.

III.

That the Court erred in taking jurisdiction in this case as if a proper appeal had been taken in that the record filed in this case in the United States District Court for the Territory of Alaska, Fourth Judicial Division, was insufficient to confer on said Court appellate jurisdiction in this to-wit: The

record contemplated by the Compiled Laws of Alaska, 1933, to be filed in the United States District Courts on Appeals, in Probate Cases, Chapter CLIV Sections 4571, 4572, 4573 and 4574 was never complied with as the record did not contain the following documents and instruments upon which [78] the United States Commissioner based her judgment of July 24, 1946, on to-wit:

a. The Depositions of Byron W. Wood, Lesta L. Fitch and H. C. Fitch taken in Oklahoma City, Oklahoma, in this cause in which it was established by the uncontradicted testimony that Mr. J. M. Pearl, now deceased, was living with his wife in Oklahoma City for quite some time before he died;

b. The Certified copy of the judgment of the District Court of Oklahoma County, Oklahoma, showing that the divorce decree between the now deceased, J. M. Pearl, and Musetta Wood Pearl, his wife, had been vacated and set aside, restoring them as man and wife; which decree was dated 7th day of May, 1942;

c. Certified and Authenticated copy of the laws of the District of Columbia as introduced in the trial before the United States commissioner in this case; which acts controlled the making of wills in the District of Columbia.

d. The Certified copy of the death certificate.

e. The Certified copies of the Letters of Administration issued to Byron W. Wood, by the County Court of Oklahoma County, Oklahoma, in the estate of Maurice O. W. Pearl, who it is shown to be the same man as J. M. Pearl, dated in Oklahoma County July 31, 1945.

IV.

The Court erred in decreeing that a letter dated 9-26-31 appearing to have been written by J. M. Pearl to Paul Griemann, to be the true and valid Last Will and Testamentof J. M. Pearl, deceased, and entitled to probate under the laws of the Territory of Alaska.

V.

The Court erred in vacating and setting aside that certain Order of the Probate Court in the said cause; which the said Order of the Probate Court held, that the letter dated 9-26-31, written by J. M. Pearl, was a contingent or conditional will and not entitled to probate as the last will and testament, of the said decedent J. M. Pearl.

VI.

That the Court erred in reversing and setting aside the findings, judgment and decree of said Probate court to the effect that the said letter dated 9-26-31, was a conditional and contingent will, and was of no legal force and effect as the last will and testament of J. M. Pearl, deceased.

VII.

The Court further erred in making an order reversing the judgment and order made by the United

States Commissioner Ex-Officio Probate Judge [79] on July 24, 1946, in which the said Probate Judge made the following findings, Judgment and Order to-wit:

"That the purported Will heretofore admitted to probate in these proceedings is not an absolute last will and testament of said decedent, J. M. Pearl, but is a conditional Will and is of no legal force or effect and is not entitled to probate as the last will and testament of said J. M. Pearl.

That an Order should be made herein revoking that certain Order entered herein on March 6, 1945, admitting to probate said document above mentioned as the last will and testament of said J. M. Pearl.

That an Order should be made herein revoking that certain Order entered herein on March 6, 1945, admitting to probate said document above mentioned as the last will and testament of said J. M. Pearl, deceased, and denying, in all other respects, the Amended Petition of said Byron W. Wood.

Now, Therefore,

It Is Hereby Ordered, Adjudged, and Decreed That thefollowing portion of that certain Order made and entered herein on the 6th day of March, 1945, entitled "Order Admitting Will to Probate and appointing Administrator with Will Annexed", to-wit:

'It Is Hereby Ordered, Adjudged, and Decreed That the document hereinabove mentioned, and the envelope thereto attached, be, and is hereby, admitted to probate as the Last Will and Testament of said J. M. Pearl, deceased.'

be, and the same is hereby, set aside and annulled, and that, in all other respects, the Amended Petition of Byron W. Wood filed herein on December 27, 1945, be, and the same is hereby, denied.

Dated at Fairbanks, Alaska, this 24th day of July, 1946".

[Probate Court Seal] ELEANOR M. ELY,
United States Commissioner and ex-officio Probate Judge.

VIII.

The Court erred in finding the letter to be an absolute will when the evidence did not justify such a finding, evidence as narrative is as follows:

Paul Greimann being the only witness, testified on direct examination by Cecil H. Clegg, his attorney of record: That his name was Paul Greimann. That he lived at Fairbanks, Alaska. Was in the automotive and bus transportation business. Was married, and had five children. That his place of business was at Second and Noble in the town of Fairbanks. Established there going on twenty-four years. That he had all equipment and facilities for taking care of and housing buses.

That he knew J. M. Pearl, the deceased first back about 1919, in Chicago, Illinois. Formed a friendship with him. Was associated with him up to 1930, was acquainted with him three years before coming to Alaska. Came to Fairbanks together, opened up the Pearl and Pearl Garage.

Mr. Pearl was about 19 years older than the witness. The witness was about forty-three years old when Mr. Pearl died. [80] He continued his friendship with him during his lifetime in Fairbanks. He lived out here on a farm that was bought by both he and I from Harry J. Busby in the winter of 1924, and owned by J. M. Pearl up to the time the army took it away from him here six years ago, or five years ago. In 1930 we had a dissolution of partnership. I bought out his equity in the Standard Garage and bought out the property on the corner of Lacey Street between First and Second. I transferred to him half of the 318-acre farm out there, which he contributed to the purchase thereof. I transferred to him one-half of the 318-acres, which is about three-quarters of a mile from Fairbanks. He lived there. Built a home there. It was taken over by the United States Army.

He left here to go to the States about six years ago, about the first of November. He was in ill health. He went to Oklahoma. Received a letter from him from Council Hill, Oklahoma, stating that he had gone to Council Hill. We had always been on friendly terms. I used to go back and forth to his place out on the farm, and he used to come into the business whenever he came into town to say

"hello", sometimes he stayed an hour or so. He still regarded me in a friendly manner, and I regarded him the same way. I think it was through my recommendation that he left. He wasn't looking any too good and said he wasn't feeling good. I told him I didn't see any reason why he should stay up here in the cold weather in the winter, and I says "why don't you pack up your clothes and go outside for the winter"? That was the last trip outside. He went outside in 1931 for medical attention. He was in a hospital in Washington, D. C. He was a veteran of the Spanish-American War. After he was released from the hospital he came back to Fairbanks.

In September I received a communication from him, a letter through the mail, addressed to Paul Greimann, that letter is what this proceeding is based on.

He had no relatives here in Alaska. The only relatives that he had was, that he made mention of, was his brother Byron. That I never had any dealings with Byron Wood.

That I based my claim to the estate on this letter. That I had my final report ready to be confirmed when I heard from Byron W. Wood the first time. That I had heard from on one outside.

That I am the appellant in this matter appealing from the order of the Commissioner; that I am the person mentioned in the letter. Then a certified copy of the letter introduced; which is shown in Transcript and Proceedings filed herein at pages 21 to and including 24. The part of the letter relied upon as a will is as follows:

"I am sitting writing to you with a thermometer in my mouth as my temperature is to be taken every 2 hours. The nurse just brot it to me it is marked at 4 p.m. which is right at hand now. I started out to church today and got 3 blocks on my way when the eye-pressure commenced and I turned back no too soon either for both the head and breast ache commenced and were quite severe when I arrived back at the hospital and jumped into bed. In about an hour the spell was gone. My head still aches but the vision dimming is all gone again. [81]

We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, and in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Galligher to help in his education. I would ask to be buried here in Arlington Cemetery. I do not expect to die but be on my way home by the 20th of Oct. or soon after as they are going right after my case properly."

That this letter was in the handwriting of J. M. Pearl. That he and Pearl were in the garage business from '24 conducted under the name of Pearl and Pearl for some time. He suggested that I adopt his name. He called me son. I never adopted the name of Pearl, was always known as Greimann. We were always very friendly except when I got married, he disapproved of my getting married. "He thought I should have asked him to get married, and there was a little dissension between he and I at that time". "However, while he never cared much for my wife, or liked my wife very well,

so far as that was concerned I think we were always on friendly terms." No open break beween us. When I got the letter above referred to I put it in my safe in the garage. When he died I waited some time to see if anybody would be appointed to take care of his estate before application was made. "I figured that if he was in Council Hill and his brother was there that he must have—— I at least thought that I would have had some kind of a wish or some kind of a tip that he wanted his brother to handle it, so I figured that at any time we might receive that notice, so therefore I never entered into it until there wasn't anything showed up.

His was farm land separated off in lots and some being sold for homes out there. He was engaged in the real estate business to the extent of selling a portion of his property that he had acquired personally.

On Cross-Examination by Mr. Taylor. He testified that he was no relation to J. M. Pearl. That as he recalled Mr. Pearl returned to Fairbanks the next spring after he went out for medical attention in 1931. Don't recall that he ever said anything about the letter he had written, relied upon here as a will. That Mr. Pearl told him he had a wife living in Oklahoma. He also said he was divorced. He came back to Fairbanks in '32. He assumed jurisdiction and control of his property from then on up until the time he left. He did seek me for advice at times, but he made the final disposition of anything pertaining to his affairs. He advised me about having a brother in Oklahoma at Council

Hill. Mr. Pearl never advised the witness that the divorce decree was set aside and of his resuming marital relationship with his wife.

I believe he died July 8, 1944, That he relied upon the part of the letter that states, "and in case I die if they do operate I bequeath you my belongings and property" to be the last will and testament. He was not operated on at that time and couldn't, then, have died from the operation. He died from paralysis in 1944. We divided the 318-acres of land, he took his half and I took mine. He assigned over his interest down were the garage was to me; that was in 1930.

On Redirect Examination of Mr. Griemann by the Court: He testified that he and Mr. Pearl came to Alaska, in 1923, established a home here in Fairbanks and voted at the elections. He never abandon that home to the knowledge of the witness. When he went outside to the hospital he said he would be back as soon as he . . . he came back and continued to vote at the elections. [82]

The next time he went out was 1940. He had had a slight stroke a couple of years before that and his health wasn't any too good, and he would have to pack the wood out there, and so forth, out out there on the ranch, and I said, "there is no use in you staying here. You have plenty to take care of yourself. Why don't you go outside? And he said, "I don't know but what I will do that." He said, "It will save a lot of anxiety," and then, he says, "nobody will have to come out and be looking after me all of the time in the wintertime to see that I have plenty of fuel." So about a week after that he

left. He left his home and everything here. I heard from his later, he said he intended to come back the following spring. He said he had bought a small house and small track of land, about five acres in Oklahoma. That it was nice and warm out there, and that he was enjoying the climate very much, but that he would be back in the spring. That would be the spring of 1941. It appears that he took sick shortly after he wrote this letter because I didn't receive any communications from him afterwards, with the exceptions of a postcard of some scene around Oklahoma City. He ask me why I didn't write; he hadn't heard from me for a long time; and that was the last communication I received. I never kept either one of them. I think the next I heard was through Mr. Clegg here, that he was ill. That was about three years ago this summer.

When I got back from the outside I learned of his death on July 8.

He had property in Alaska when he wrote the letter in 1931, and had property here at the time of his death. The property had been taken by the army at the time of his death and money had been deposited in Court in payment of it; around $10,-000.00. They had taken the land in 1941. The only part of the estate that existed here was the money deposited in the Court. I never made inquiries about the Oklahoma property.

On Cross-Examination of Mr. Greimann by Mr. Taylor: He testified that he didn't know that he resided in the state of Oklahoma with his wife. He

didn't return to the Territory of Alaska. I think he was in a veteran's hospital in Muskogee.

On Further Examination of Mr. Greimann by the Court: He testified "that he died in a Veteran's Hospital in Muskogee, Oklahoma. He went in there shortly after he left Alaska, must have been some time in the spring of 1941. He know my children and was fond of them. It was his habit to give them a dollar on their birthday, if he knew when it was or if it was mentioned. He continued to call me "son" always or "Paul, boy."

In the letter above mentioned he called me "Dear Paul, boy," and he signed it as "J. M. Pearl" or "dad", because I always called him "Dad", sometimes he signed it just "Dad", and this letter was signed dad and J. M. Pearl.

Further Cross-Examination of Mr. Greimann by Mr. Taylor: That sometimes he signed J. M. Pearl and sometimes J. M. O. W. That he was in the probate court in Fairbanks when the depositions were read.

IX.

The Court further erred in making and entering the Decree on October 14, 1946; which is as follows:

"No. 5525

DECREE

Be It Remembered That this cause came on to be heard before the above entitled Court on the 2nd day of October, 1946, appellant, Paul Greimann, individually and as Administrator with [83] Will

Annexed of the Estate of J. M. Pearl, deceased, appearing in person and by his attorney, Cecil H. Clegg, and appellee, Byron W. Wood, petitioner, appearing by his attorney, Warren A. Taylor, Appellant presented certain oral and documentary testimony and evidence and rested, and petitioner, Byron W. Wood, as appellee, offered none. Thereupon said cause was argued before said Court by respective counsel and was taken under advisement by said Court. Thereafter, on October 9, 1946, said Court, having considered the arguments of counsel and the law and evidence upon the issue of whether or not the letter of decedent hereinafter described constitutes a contingent or absolute Will, filed its written opinion herein holding in favor of appellant and against appellee-petitioner.

Wherefore, by virtue of the law and the premises,

It Is Hereby Ordered, Adjudged, and Decreed That the letter dated 9-26-31 written by J. M. Pearl, decedent above named, in his own handwriting, signed by him, and mailed by him from Washington, D. C., on September 27, 1931, addressed to Paul Greimann, Fairbanks, Alaska, is the true and valid Last Will and Testament of said decedent, J. M. Pearl, and is entitled to probate as such under the laws of Alaska, as heretofore adjudicated on the 6th day of March, 1945, by the Probate Court for the Fairbanks Precinct, Alaska; and

It Is Further Ordered, Adjudged, and Decreed That the Order and Decree of the said Probate Court made and entered on the 24th day of July,

1946, in the above entitled probate proceeding pending in said Probate Court, numbered 1019, revoking, vacating, and setting aside said Order of March 6, 1945, admitting said letter to probate as the last will and testament of said decedent, J. M. Pearl, upon the ground that said letter was invalid as an absolute will of decedent and was merely a contingent or conditional Will in its terms and intent, be, and the same is hereby, vacated, set aside, and held for naught.

It Is Further Ordered, Adjudged, and Decreed That the finding and Decree of said Probate Court to the effect that said letter is a conditional will and is of no legal force or effect as a last will and testament and, therefore, not entitled to probate as the last will and testament of said J. M. Pearl, deceased, be, and the same is hereby, reversed and set aside.

It Is Further Ordered and Adjudged That said appellant, Paul Greimann, have and recover his costs and disbursements upon said appeal proceeding, taxed by the Clerk of this Court at the sum of $............

It Is Further Ordered That the Clerk of this Court deliver to said Probate Court a true copy of this Decree, duly certified by said Clerk.

Dated at Fairbanks, Alaska, this 14th day of October, 1946.

HARRY E. PRATT,
District Judge.

X.

Thereafter, and on the 21st day of October, 1946, a notice of appeal was duly served and filed in this cause; which is in words and figures as follows: [84]

"In the District Court for the Territory of Alaska, Fourth Division.

No. 5525

In the Matter of the Estate of
J. M. PEARL, Deceased.

Filed in the District Court, Territory of Alaska, 4th Div., Oct. 21, 1946. John B. Hall, Clerk.

NOTICE OF APPEAL

Name and Address of Appellant: Byron W. Wood, Council Hill, Oklahoma.

Name and Address of Appellant's Attorneys: Bailey E. Bell, Fairbanks, Alaska; Warren A. Taylor, Fairbanks, Alaska.

Name and Address of Appellee: Paul Greimann, Fairbanks, Alaska.

Name and Address of Appellee's Attorney: Cecil H. Clegg, Fairbanks, Alaska.

Notice is hereby given that Byron W. Wood, petitioner in the above entitled cause does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit of the United States of America, from a Decree entered in the above entitled action on the 14th day of October, 1946, and for grounds of appeal alleges as follows:

I.

That the Court erred in decreeing a letter dated 9/26/31, written by J. M. Pearl to be the true and valid Last Will and Testament of J. M. Pearl, Deceased, and entitled to probate under the laws of the Territory of Alaska.

II.

That the Court erred in vacating and setting aside that certain order of the Probate Court in the said cause, which said order of the probate Court held that the letter, dated 9-26-31 written by J. M. Pearl was a contingent or conditional will and not entitled to probate as the Last Will and Testament of the said decedent, J. M. Pearl.

III.

That the Court erred in reversing and setting aside the findings and decree of said probate court to the effect that the said letter was a conditional or contingent will and was of no legal force and effect as the Last Will and Testament of J. M. Pearl.

Dated at Fairbanks, Alaska, this 18th day of October 1946."

WARREN A. TAYLOR,
Of Plaintiff's Attorneys.

Service of copy acknowledged this 21st day of October, 1946.

CECIL H. CLEGG,
Attorney for Paul Greimann

Thereafter, and on the 19th day of December, 1946, Petition for Allowance of Appeal was filed, which is as follows:

"In the District Court for the Territory of Alaska, Fourth Division.

No. 5524

In the Matter of the Estate of
J. M. PEARL, Deceased.

Filed in the District Court, Territory of Alaska, 4th Div., Dec. 19, 1946. /s/ John B. Hall, Clerk.

PETITION FOR ALLOWANCE OF APPEAL

The petitioner in the above entitled cause, considering himself aggrieved by the decree entered in the said cause on the 14th day of October, 1946, in favor of the administrator of the Estate of J. M. Pearl, Deceased, which said decree reversed and set aside the Order and Decree of the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, which found and decreed that a certain letter written by the decedent, J. M. Pearl, was not a true and valid will of deceased; and which order and decree of said probate court revoked it's previous order admitting the said letter to probate as the Last Will and Testament of deceased. That the District Court for the Territory of Alaska further ordered and decreed that the said letter was a true and valid will of the decedent, J. M. Pearl, and entitled to probate under the laws of the Territory of Alaska. By said Decree the issues

were determined in favor of the Administrator of said Estate of Decedent and against the petitioner and appellant, Byron W. Wood.

The petitioner having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified and set forth, does respectfully pray that his said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said decree was made and entered, be duly authenticated by the Clerk of this Court, and sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; and this said petitioner, Byron W. Wood, does further pray that said decree aforementioned be corrected, set aside, reversed and a new trial ordered, and that the Court fix the amount of appeal bond to be filed herein.

Dated at Fairbanks, Alaska, this 19th day of December, 1946.

/s/ WARREN A. TAYLOR,
Of Attorneys for Petitioner.

Due Service of the foregoing Petition, admitted this —— day of October, 1946, by receipt of copy thereof.

Attorney for Administrator.

XII.

Then on the 19th day of December, 1946, Order Allowing Appeal and fixing appeal Bond was

signed by the Trial Judge and filed herein, which is as follows to-wit:

"In the District Court for the Territory of Alaska, Fourth Division.

No. 5524

In the Matter of the Estate of

J. M. PEARL, Deceased.

Filed in the District Court, Territory of Alaska, 4th Div., Dec. 19, 1946. John B. Hall, Clerk.

ORDER ALLOWING APPEAL AND FIXING APPEAL BOND

On this 2nd day of October, 1946, the same being one of the days of the General March, 1946, Term of this Court, this cause came on regularly to be heard upon the petition of Byron W. Wood for the allowance of an appeal in behalf of the said petitioner from the decree entered in the said cause on the 14th day of May, 1946, which said decree reversed a decree of the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, in the said matter, and also fixing the amount of appeal bond on the said appeal, and the place of hearing said appeal, and the said Court being fully advised [86] in the premises it *is* hereby finds that the amount of the appeal bond should be Two Hundred Fifty ($250.00) Dollars, Now, Therefore,

It Is Hereby Ordered That the appeal of said petitioner from the decree entered herein on the 14th day of October, 1946, be, and the same is al-

lowed, to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of records, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said decree appeared from is based, be transferred, duly authenticated to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before thirty (30) days from this date, to be heard at San Francisco, California, and

It Is Further Ordered That the amount of the Appeal Bond be, and is hereby fixed at the sum of $250.00; said bond to be submitted and approved by the undersigned Judge of this Court; and

It Is Further Ordered that in preparing and printing the record on appeal in said cause, the title of the Court and cause shall be printed on the first page of said record, and that thereafter it may be omitted, and, in place thereof, the words "Title of Court and Cause" may be inserted, and that all endorsements on all papers may be omitted except the Clerk's filing marks and admission of service.

Done in Chambers on this 19th day of December, 1946."

HARRY E. PRATT,
District Judge.

Service of the foregoing Order allowing Appeal and Fixing Amount of Appeal Bond admitted this .... day of October, 1946, by receipt of copy thereof.

Entered in Court Journal No. 34, Page 314-315, Dec. 19, 1946.

XIII.

Thereafter, the Trial Judge being absent from the Territory of Alaska, and on application and showing duly made the time for taking and filing of Appeal in this case was by an order of the United States Circuit Court of Appeals extended to March 1st, 1947; a copy of said order is as follows, to-wit:

"In the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

No. 5525

In the Matter of the Estate
Of
J. M. Pearl, Deceased

ORDER EXTENDING TIME TO FILE, RECORD AND DOCKET CAUSE ON APPEAL

On motion of the appellant in the above entitled cause, by Warren A. Taylor, one of his attorneys, for an order extending the time to file, record and docket the said cause on appeal in this court, it appears to this Court that by reason of the absence of counsel from the Territory of Alaska, and the absence of the District Judge for the Territory of Alaska, Fourth Division from the Territory of Alaska renders it impossible for the said cause to be filed, recorded and docketed in this court within the time allowed by law; and the Court being fully advised in the premises and good cause [87] appearing therefor;

It Is Hereby Ordered that the time within which

the record on appeal in this case shall be deposited and filed in this Court with the Clerk thereof, and said cause docketed therein, be, and the same is extended and enlarged to and including the 1st day of March, 1947.

Dated at San Francisco, California, this 8th day of January, 1947."

/s/ FRANCIS A. GARRECHT,
United States Circuit Judge.

A True Copy. Attest: Jan. 8, 1947.

/s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Jan. 8, 1947.

XIV.

Thereafter, and on the .... day of February, 1947, this appellant, Byron W. Wood, filed Assignment of Errors, which are incorporated in the Transcript and made a part of this Bill of Exceptions by reference as fully as if set out herein.

XV.

On the 19th day of December, 1946, Appeal Bond was duly filed herein and is set out in the Transcript of the Record and made a part of this Bill of Exceptions by reference as fully as if set out herein in full.

XVI.

That Rules No. 42 and 60 of the rules of the District Court of the Territory of Alaska, Fourth Judicial Division, are as follows:

Rule 42. Exceptions in Civil Cases

Whereas the laws of Alaska relative to civil procedure provide:

(a) Section 3636, Compiled Laws of Alaska, 1933: "No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court."

(b) Section 3637, Compiled Laws of Alaska, 1933: "The verdict of the jury, any order or decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made to its admission or rejection at the time of its offer, or made upon ex parte application or in the absence of a party, Are Deemed Excepted to Without the Exception Being Taken or Stated, or Entered in the Journal."

It shall not be necessary for counsel to take exceptions in such cases, but, if they so wish, they may in making up a bill of exceptions for the same, show that the exception was duly taken. [88]

Rule 60. End of Term

(a) The period of time provided for the doing of any act or the taking of any proceedings

is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of this court to do any act or take any proceedings in any civil or criminal action which has been pending before it.

(b) Any and all undisposed of matters of any nature, pending in this court at the termination of any term, shall be continued over to the next term, and the situation respecting the same shall in no wise be affected by the termination of any term or terms.

Byron W. Wood respectfully contends that the Court erred in the proceedings herein, where each assignment of error is complained of in the Assignment of Errors filed in this cause, and each of the matters set out in this Bill of Exceptions, and prays a reversal of the judgment in the above entitled cause, and that a proper judgment be rendered herein, based upon the pleadings, records and evidence.

WARREN A. TAYLOR and
BAILEY E. BELL,
/s/ By BAILEY E. BELL,
Attorneys for Byron W.
Wood, Appellant.

CERTIFICATE

The within and foregoing Bill of Exceptions, together with the exhibits thereto attached is hereby settled and allowed and is approved and certified as a correct record of the evidence produced at the

trial of the case and a correct statement of such proceedings, pleadings, ruling and exceptions in said cause during the trial and both prior and subsequent thereto as are deemed necessary by the respective parties to present clearly the matters for review as to which exceptions are reserved, and as are included in the record herein.

It is further certified, that such bill was settled and allowed during the judgment-term or proper extensions thereof, and within the time allowed by the Courts, for the settlement thereof.

Given under my hand this .... day of February, 1947.

....
District Judge.

[Endorsed]: Lodged and filed Feb. 6, 1947. [89]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Bail, Clerk of the above-entitled Court:

You will please prepare transcript of record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, setting in San Francisco, California, heretofore perfected to said Court and include therein the following papers and records to-wit:

1. The transcript in full as prepared by Eleanor M. Ely, United States Commissioner Ex-Officio Pro-

bate Judge, which transcript was filed in above Court on August 15th, 1946, which includes: The letter of 9-26-31, which contended by appellant, Paul C. Greimann, Administrator with will annexed, to be the last will and testament of J. M. Pearl. The Order admitting will to probate and appointing administrator with will annexed. The amended petition for removal of administrator, contest of purported will, to set aside admission of will to probate and application to set for hearing, filed on behalf of Byron W. Wood, with all exhibits attached thereto.

2. The Answer of Paul C. Greimann, Administrator with will annexed.

3. The Reply filed by Byron W. Wood.

4. Application for permission to take depositions.

5. The objections to issuance of commission to take depositions.

6. Order overruling objections to issuance of commission to take depositions.

7. Order and Decree revoking Order of March 6, 1945, admitting to probate a certain document dated 9-26-31, and envelope attached thereto as Last Will and Testament of decedent.

8. Notice of Appeal of Paul C. Greiman, Administrator with will annexed, and Exceptions of Paul C. Greimann, Administrator to decree revoking order.

9. Transcript of Testimony and proceedings.

10. Order to draw judgment.

11. Decree.

12. Notice of Appeal to the Ninth Circuit Court of Appeals. [90]

13. Petition for Allowance of Appeal.

14. Order allowing Appeal and Fixing Appeal Bond.

15. Appeal Bond.

16. Order Extending time by Circuit Court of Appeals.

17. Assignment of Errors showing service thereof.

18. Bill of Exceptions showing service thereof.

19. Praecipe for transcript of record.

20. Citation on Appeal showing service.

21. Order refusing to sign and settle Bill of Exceptions.

22. Letter from Bailey E. Bell to Judge Harry E. Pratt.

23. Order as refiled refusing to sign Bill of Exceptions.

This transcript is to be prepared as required by the law and the rules and orders of this Court, and of the Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, so that it will be docketed therein, on or before, the 1st day of March, 1947, pursuant to the order of this Court and the order of the Ninth Circuit Court of Appeals.

Dated at Fairbanks, Alaska, this 24th day of February, 1947.

WARREN A. TAYLOR and
BAILEY E. BELL,
/s/ By BAILEY E. BELL,
Attorneys for Byron W. Wood, Appellant.

[Endorsed]: Filed Feb. 24, 1946. [91]

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5524

In the Matter of the Estate
Of
J. M. Pearl, Deceased

CITATION

The President of the United States of America, To Paul C. Greimann, Administrator with Will annexed, and Paul C. Greimann, and your attorney of Record, Cecil H. Clegg, Greetings:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within Forty (40) days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above case on the 19th day of December, 1946. In which Byron W. Wood was the petitioner and contestant of the will, and is the appellant here, and Paul C. Greimann, Administrator with will annexed, is the appellee, to show cause, if any there be, why the judgment rendered in said cause, on the 14th day of October, 1946, in favor of Paul C. Greimann, Administrator with will annexed, and against Byron W. Wood, contestant of the will, the appellant here, and to show why said judgment should not be corrected, set aside and reversed, and why speedy justice should not be done, to contestant and appellant, Byron W. Wood, and appellee, Paul C. Greimann, Administrator with will annexed, as above-named.

Witness the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 20th day of February, 1947.

Attest my hand and the seal of the above-named District Court for the Territory of Alaska, Fourth Judicial Division, on the 20th day of February, 1947.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Lodged Feb. 6, 1947. Filed Feb. 20, 1947. [92]

[Title of District Court and Cause.]

MARSHAL'S RETURN ON CITATION

I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Judicial Division, do hereby certify and return that I received the hereto attached Citation at Fairbanks, Alaska, on the 20th day of February, 1947, and that thereafter on the 21st day of February, 1947, I duly served the same, by delivering a true copy thereof to Paul C. Grieman, personally at Fairbanks, Alaska.

Dated at Fairbanks, Alaska, this 21st day of February, 1947.

STANLEY J. NICHOLS,
United States Marshal.

By JOHN J. BUCKLEY,
Deputy.

Marshal's Fees, $3.00.

[Endorsed]: Filed Feb. 21, 1947. [92-a]

[Title of District Court and Cause.]

ORDER REFUSING TO SIGN AND SETTLE BILL OF EXCEPTIONS

Whereas judgment was entered herein upon the 14th day of October, 1946, but no proposed bill of exceptions was filed herein until the 6th day of February, 1947, and no order extending the time for filing such proposed bill of exceptions was made within three months of the entry of said judgment or at any time whatsoever except upon the 11th day of February, 1947; and

Whereas the laws of Alaska (Chap. 61, P. 131, Chap. 44, P. 114, Session Laws of Alaska 1937; Buckley vs. Verhonic 82 F. (2d) 730) require such proposed bill of exceptions to be filed in the cause within three months of the entry of judgment therein; and

Whereas said proposed bill of exceptions has not been served upon the adverse party or his attorney though Rule 41 of this Court requires such service prior to the filing thereof and gives the adverse party ten days after such service within which to file objections or proposed amendments to proposed bills of exceptions; and

Whereas it appears that the power to extend the time for filing said proposed bill of exceptions did not upon the 11th day of February, 1946, exist in any court and it further appears that under said Rule 41 this Court has no authority to consider a proposed bill of exceptions prior to its being served upon the adverse party or his attorney;

Now, Therefore, it is hereby adjudged that no power exists in this court or a judge thereof to settle said bill of [93] exceptions under the above-mentioned conditions.

Done in chambers at Fairbanks this 20th day of February, 1947.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed Feb. 20, 1947. [94]

LETTER FROM BAILEY E. BELL TO JUDGE HARRY E. PRATT

Honorable Harry E. Pratt,
Judge of the United States District Court,
Fairbanks, Alaska.

Dear Sir:

I have just been given a copy of the order, made by you yesterday, in the matter in the estate of J. M. Pearl, deceased, and beg to call your attention to the following cases which are more directly in point from the standpoint of facts than the case you relied on in the order:

Stickel vs. United States, 294 Fed. 808.
United States vs. Tucker, 65 Fed. 2nd, 661.
Howard vs. Louisiana & A. Ry. Co., 49 Fed. 2nd, 571.

In the third paragraph in your order it is stated that, "The proposed bill of exceptions has not been served upon the adverse party or his attorney." This is an error as the records, clearly show, that the United States Marshal served the assignment of errors and the proposed bill of exceptions on Paul

C. Greimann personally, on the 6th day of February, 1947.

Rule 41 was complied with by the Marshal serving Mr. Greimann personally, since the Honorable Cecil H. Clegg, his attorney, had previously left the Territory of Alaska, and was somewhere in the Continental United States, and more than ten days has expired since the proposed bill of exceptions and assignment of errors were duly served by the Marshal, therefore, the above cited cases clearly show, that you have a perfect right and authority to sign and settle this bill of exceptions now.

Possibly you did not know that the United States Circuit Court of Appeals, at San Francisco, made an order on January 8, 1947, extending time to file and record this case, to March 1, 1947; then made another order extending time for filing and settling the bill of exceptions to February 25th was made on February 11, 1947.

Of course, this still being in the same term in which judgment was rendered, and your Honor recessing court on December 19th, and you leaving the Territory of Alaska to return about the 17th or 18th of February, 1947, prevented the submission to you of the bill of exceptions until your return [95] to the Territory, and to your district, therefore, there being no neglect or lack of diligence on the part of the Appellant it is our contention that you should settle and sign the bill of exceptions now and let opposing counsel raise the question of jurisdiction in the Ninth Circuit Court of Appeals with a motion to strike, or any other remedy he cares to use. This is especially true

since the rules of the United States Circuit Court of Appeals effect appeals from Alaska, even if they do not effect trial procedure here, and the Territorial Statute relied on by you could not override the rules of the U. S. Circuit Court of Appeals. This is especially true since this is still within the same term of Court in which the judgment was rendered.

Respectfully submitted,

/s/ BAILEY E. BELL,
Of Counsel for Appellant.

[Endorsed]: Filed Feb. 21, 1947. [96]

[Title of District Court and Cause.]

ORDER AS REFILED REFUSING TO SIGN BILL OF EXCEPTIONS

For good cause shown, the order heretofore entered herein by this court upon the 20th day of February, 1947, is hereby amended to read as follows, to-wit:

Whereas judgment was entered herein upon the 14th day of October, 1946, but no proposed bill of exceptions was filed herein until the 6th day of February, 1947, and no order extending the time for filing such proposed bill of exceptions was made within three months of the entry of said judgment or at any time whatsoever except upon the 11th day of February, 1947; and

Whereas the laws of Alaska (Chap. 61 P. 131, Chap. 44, P. 114, Session Laws of Alaska, 1937;

Buckley vs. Verhonic 82 F. (2d) 730) require such proposed bill of exceptions to be filed in the cause within three months of the entry of judgment therein; and

Whereas it appears that the power to extend the time for filing said proposed bill of exceptions did not upon the 11th day of February, 1947, exist in any court;

Now, Therefore, it is hereby adjudged that no power exists in this court or a judge thereof to settle said bill of exceptions under the above-mentioned conditions.

Done in chambers at Fairbanks this 21st day of February, 1947.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed Feb. 21, 1947. [97]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF THE DISTRICT COURT TO TRANSCRIPT OF RECORD

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 99 pages, including pages 60a and 92a, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 5524, entitled In the Matter of the Estate of J. M. Pearl, Deceased, and was made pursuant to and in accordance with the Prac-

cipe of the Appellants, filed in this action, and by virtue of the said Appeal and Citation issued in said cause, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of page "a," is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page "b," is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to $8.25 has been paid to me by counsel for the appellants in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 24th day of February, 1947.

[Seal] /s/ JOHN B. HALL,

Clerk, District Court, Territory of Alaska, 4th Division.

[Endorsed]: No. 11553. United States Circuit Court of Appeals for the Ninth Circuit. Byron W. Wood, Appellant, vs. Paul Greimann, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

Filed February 27, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,

VERSUS

PAUL GREIMANN,
Appellee.

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division

---

BRIEF ON BEHALF OF APPELLANT, BYRON W. WOOD

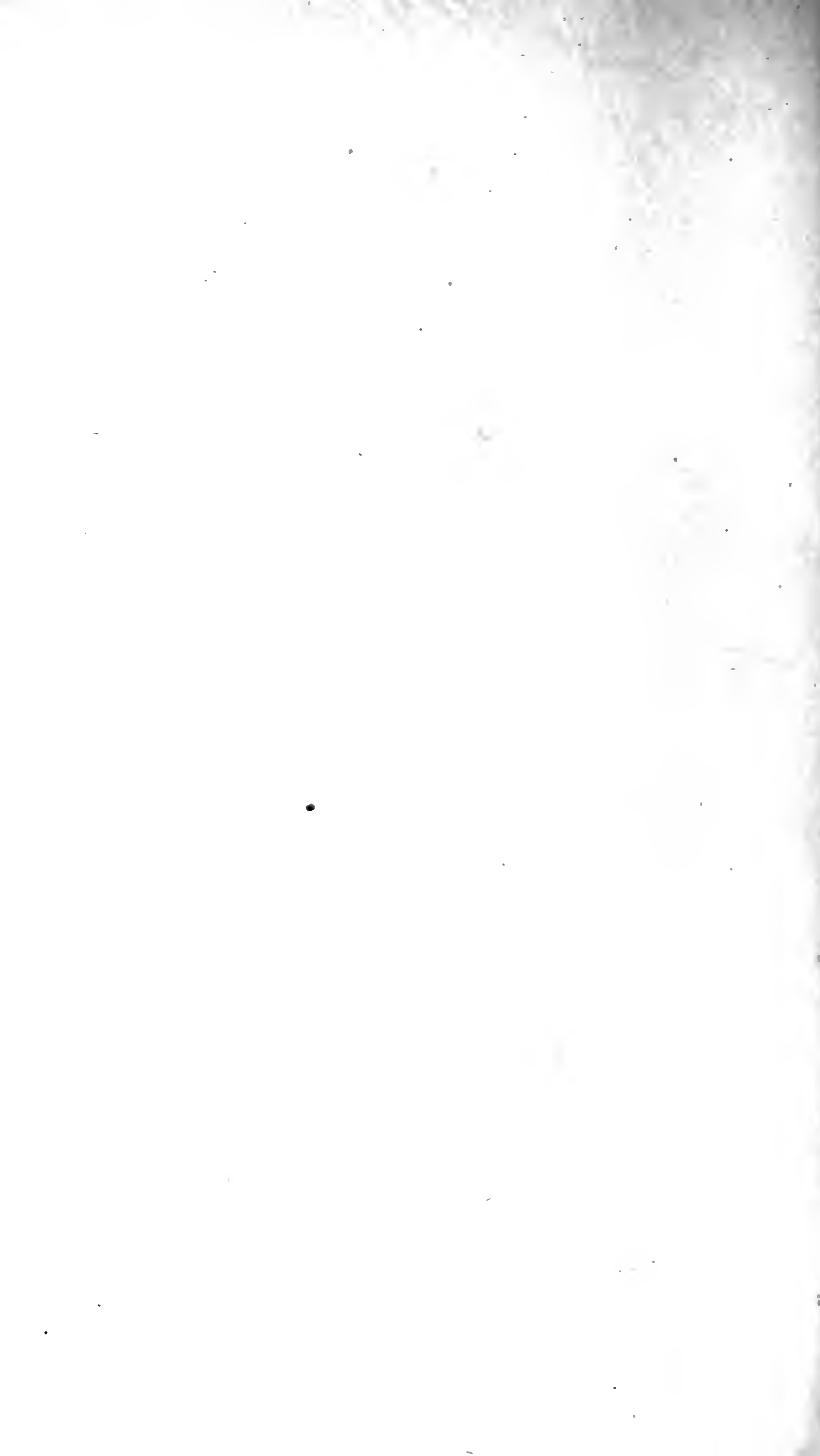
RECEIVED
AUG 7 1947
PAUL P. O'BRIEN,
CLERK

CHARLES E. MCPHERREN,
Perrine Building,
Oklahoma City, Oklahoma,
Attorney for Appellant.

AUGUST, 1947

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

FILED
OCT 1947



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Pertinent Controlling Principles and Rules as to the Construction and Classification of Testamentary Instruments:

1. That a contingent will is one which is dependent on a stated contingent event or condition,

and the happening of which is a condition precedent to the operation of the instrument as a will, is so well settled as to require no supporting authority. From early times in England and the United States the distinction between contingent and general testamentary instruments has been clearly recognized.

2. The controlling rule is that where the language of the instrument clearly conditions its operation on the happening, or on the not happening, of any event or condition, the will is contingent and is inoperative and void where the event or condition does not occur.

3. The rule is also well settled that the test as to whether a testamentary instrument which refers to the probability of the death of the testator occurring under certain circumstances, or as the result of a certain event or peril, is to be adjudged contingent or general on the death of the testator, depends on whether the same were referred to as narrative and the inducement for making the will, in which event the will is not contingent on death occurring under the referred to circumstances, or whether the circumstances or events are referred to as the reason for making the particular dispositions and the circumstances are so related to each other that the one is dependent on the other, the will is contingent upon the occurrence of the said circumstances.

4. The above rules of construction and classification of testamentary instruments are equally applicable to writings in the form of wills as to letters in the nature of holographic wills, whether preserved by the author or by another, except that, as to letters, same being usually of a temporary nature, the facts and circumstances existing, and subsequently occurring, and the attitude and actions of the parties with relation to the letter after the referred to events failed to occur, are proper considerations.

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5. The rule of presumption against intestacy cannot be used to justify a revision of the clear language of a testamentary instrument. 24-36

AUTHORITIES:

Dougherty v. Holscheider,
88 S.W. (Tex.) 1113;

Ferguson v. Ferguson,
45 S.W.(2d) S. Ct. Tex. 1096;

In re: Forquer's Estate,
216 Pa. 331, 66 Atl. 92;

Phleps v. Ashton, 30 Tex. 344;

Tarver v. Tarver, 9 Pet. 174, 9 L.ed. 91;

Wilson v. Higgason,
178 S.W.(2d) (Ark.) 855.

Where the word "if" is used in a testamentary instrument, as in the case at bar, to introduce a specifically stated condition or event, the word must be held to mean "in that case" and to express the condition or event which must arise or occur as a condition precedent to the operation of the instrument as a will, is the holding of all the authorities. 36-51

AUTHORITIES:

Damon v. Damon, 8 Allen (Mass.) 192;

Davis v. Davis, 65 So. (Miss.) 241;

Ellison v. Smuts, 151 S.W.(2d) (Ky.) 1017;

In re: Cook's Estate, 150 Pac. (Cal.) 553;

In re: Poonarian's Will,
224 N. Y. 227, 138 N.E. 606;

In re: Young's Estate,
95 Okla. 205, 219 Pac. 100;

Lee v. Kervy, 217 S.W. (Ky.) 985;

Maxwell v. Maxwell, 3 Met. (Ky.) 101;

Morrow's Appeal, 9 Atl. (Pa.) 660;

Oetjen v. Diemmer, 42 S.E. (Ga.) 388;

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Sinclair v. Hone,
6 Ves. Jr. 607, 21 Eng. Reprint, 1219;
Todd's Will, 2 Watts & S. (Pa.) 145;
Walker v. Hibbard, 215 S.W. (Ky.) 800.

Authorities relied upon by appellee not in point and insofar as applicable to the facts in the case at bar hold against the probation of the letter propounded as a will. 51-60

AUTHORITIES:

Barber v. Barber, 13 N.E. (2d) (Ill.) 257;
Eaton v. Brown, 193 U.S. 411,
24 S. Ct. 487, 48 L. ed. 730;
In re: Langer's Estate, 281 N.Y.S. 866;
In re: Moore's Estate, 2 Atl. (2d) (Pa.) 761;
Merriman v. Schiel, 140 N.E. (Ohio) 600;
In re: Tinsley's Will, 174 N.W. (Iowa) 4;

Where, as in the case at bar, the language of the testamentary instrument is plain and clear, both in its expression and in its meaning, the application of rules of construction is unnecessary. 60-61

AUTHORITIES:

Birley's Adm'rs v. United Lutheran Church in America, 239 Ky. 82, 39 S.W. (2d) 203;
Citizens' & Southern Nat. Bank v. Clark,
172 Ga. 625, 158 S.E. 297;
Conner v. Everhart, 160 Va. 544, 169 S.E. 857;
Fields v. Fields, 139 Ore. 41, 3 Pac. (2d) 771; rehearing denied 139 Ore. 41, 7 Pac. (2d) 975;
Foss v. State Bank & Trust Co., 343 Ill. 94, 175 N.E. 12, affirming State Bank & Trust Co. v. Foss, 257 Ill. App. 435;
In re: Clark's Estate,
103 Cal. App. 243, 284 Pac. 231;

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In re: Blanch's Will,
214 N.Y.S. 565, 126 Misc. 421;

In re: Barrett's Estate,
253 N.Y.S. 658, 141 Misc. 637;

In re: Watson's Will, 258 N.Y.S. 755, 144 Misc. 213, modified 262 N.Y.S. 394, 237 App. Div. 625, modified 262 N.Y. 284, 186 N.E. 284;

In re: Weed's Will,
213 Wis. 574, 252 N.W. 294;

Low v. First Nat. Bank & Trust Co. of Vicksburg, 162 Miss. 53, 138 So. 586, 80 A.L.R. 112;

White v. Weed, 87 N. H. 153, 175 Atl. 814;

Williams v. Best, 195 N. C. 324, 142 S.E. 2.

The rule of presumption against intestacy cannot be used to justify a revision of the clear language of a will, and the court, under the guise of construing a will, will not write a new will, and what the testator says in the instrument must control, and the court must not construe the language used to cause same to express what the testator did not intend. 61-62

AUTHORITIES:

First Nat. Bank v. Shukan, 126 So. 409;

In re: Hoytema's Estate, 181 Pac. (Cal.) 645;

Jones v. Brown, 144 S.E. (Va.) 620;

Toso v. State Bank & Trust Co.,
175 N.E. (Ill.) 12;

Glover v. Reynolds, 37 Atl. (N.J.) 90;

Verhalen v. Klein, 28 S.W. (Tex.) 975.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,

VERSUS

PAUL GREIMANN,
Appellee.

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division

---

BRIEF ON BEHALF OF APPELLANT, BYRON W. WOOD

STATEMENT OF CASE, PLEADINGS, FACTS, DISCLOSING THE JURISDICTION OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS, AND THE PROCEEDINGS HAD AND ORDERS AND DECREES MADE AND ENTERED

This is an appeal by the appellant, Byron W. Wood, of Council Hill, Oklahoma, as heir and administrator of the estate of J. M. Pearl, deceased, whose true name was James Maurice Wood, and who died July 8, 1944, in the State of Oklahoma, to this Court from a judgment and decree of the District Court for the Fourth Judicial Division of the Territory of Alaska, reversing, setting aside and vacating an award of the United States Commissioner and *ex officio* probate judge of the Fairbanks District of the said Fourth Judicial Division, which revoked an order probating a purported letter dated September 26, 1931, in Washington, D. C., as the last will and testament of said J. M. Pearl, deceased, and admitting to probate said letter on the Petition of Appellee, Paul Greimann, as such last will and testament.

This statement of the case, pleadings, facts, proceedings, orders, judgments and decrees discloses the jurisdiction of the said Probate, District and the Circuit Court of Appeals, Ninth Circuit, to hear and determine the issues and questions presented in this cause and on this appeal under the provisions of the general Acts of Congress relating to the Territory of Alaska, and the Ninth Circuit Court of Appeals of the United States; Chapter CXLII of the Compiled Laws of Alaska 1933 (Sec. 3348-4571) and Chapter CXIX, Page 802, *et seq.*, said Compiled Laws, and Judicial Code, Section 128, 28 U.S.C.A., 225.

This proceeding had its inception in the filing of a Petition on the 20th day of February, 1945, by one Paul

Greimann, a resident of Fairbanks, Alaska, in the office of the said United States Commissioner and the *ex officio* probate judge, with a letter attached purporting to have been written by J. M. Pearl, deceased, dated September 26, 1931, in Washington, D. C., to the said Greimann and that said Pearl had died in Oklahoma, July 8, 1944, praying that the said letter be admitted to probate and declared to be the last will and testament of the said decedent , J. M. Pearl, and that the said petitioner be appointed administrator of the estate of the said J. M. Pearl, deceased, with will annexed (Tr. 2-6).

Said letter so written in Washington, D. C., and dated September 26, 1931, some 13 years prior to the death of said decedent, J. M. Pearl, while a resident of the State of Oklahoma, and attached to said petition, is in words and figures as follows:

Mount Alto Hospital, Washington, D. C.
2650 Wisconsin Ave. 9-26-31.

"Dear (Boy) Paul,—I had supposed that I would be quite a ways on my homeward bound journey by this time but fate deals elusively at times and handles our courses and actions in a curious and extremely decisive manner at times. I was discharged on Sept. 17th and expected to start home on the 18th but not having received the desired results at the Naval Hospital, Judge Wickersham and Dr. Cline head of the Veterans Bureau stopped the effect of my discharge and I was put in Mt. Alto Hosp. It almost takes an act of Congress to get in here but when Dr. Cline puts his stamp on your entry it is done, but usually it is most difficult to get him to acquiesce in it. Well, I am here and so much examining as I have gone thru has nearly worn

me out. Last Thursday I had the worst spell from several standpoints that I have ever had. The headache, breast-ache, and stomach nausea, a resultant of their co-operative aches were very severe and the almost complete blindness that came upon me lasted more than 12 hours the longest spell I have ever had.
* * *

"We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, *and in case I die if they do operate I bequeath you my belongings and property all except $100. to be given to Robert Galligher to help him in his education.* I would ask to be buried here in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly.
* * *

"With love & best wishes to all
As ever
DAD J. M. PEARL."

On March 6, 1945, the said probate court made and entered an order admitting said will to probate and appointing the said Paul Greimann administrator with will annexed (Tr. 7-9).

Thereafter appellant, Byron W. Wood, filed in the said probate court a Petition and an Amended Petition alleging said Byron W. Wood to be the brother and the duly appointed administrator of the said J. M. Pearl, deceased, whose true name was James Maurice Wood, and who died July 8th, 1944, a resident of Oklahoma, and praying that the said order probating the said letter as the last will and testament of said decedent, and appointing the said Paul Greimann administrator of said estate, be set aside and vacated and in support thereof, in substance, alleged:

1. That said letter alleged to be a will was purportedly written in Washington, District of Columbia, on September 26, 1931, and on its face and shows that it was not intended as a will, and was conditional, and was not executed in the manner required by the current laws of the District of Columbia alleged to be as follows:

> "All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; and, moreover, no devise or bequest, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence and by his direction and consent; but all devises and bequests shall remain and continue in force until the same be burned, canceled, torn, or obliterated by the testator or by his direction in the manner aforesaid, or unless the same be altered or revoked by some other will, testament, or codicil in writing, or other writing of the testator signed in the presence of at least two witnesses attesting the same, any former law or usage to the contrary notwithstanding. (March 3, 1901, 31 Stat. 1444, Ch. 854, § 1626.)" (6) (Tr. 11).

2. That Paul Greimann was not related to the said decedent, J. M. Pearl, and was not qualified for appointment as administrator of said estate; that the language and terms of the said letter, aside from the fact that same was not executed in the manner required by law, show that same was not intended as a will and was conditioned and contingent on the death of the said J. M. Pearl in the event of a contemplated operation at the hospital in Washington, D. C., in which he was a patient. The operation was not performed,

and the death of the decedent did not occur until some 13 years later and after the decedent had rejoined his wife and relatives and was a resident of Oklahoma (Tr. 11-13).

"That said petitioner is the duly qualified and acting administrator of the estate of the deceased Maurice O. W. Pearl, having been appointed by C. J. Blinn. Judge of the County Court of Oklahoma County, on the 31st day of July, 1945. A certified copy of the appointment is hereto attached marked 'Exhibit A' and made a part hereof, by reference (Tr. 13-18).

"Petitioner further alleges that his brother, J. Maurice Wood, known as Maurice Wood Pearl, also known as J. M. Pearl, was a veteran of the Spanish American War, was seventy-five years and sixteen days of age at the time of his death, which took place July 8, 1944, in the Veterans Hospital at Muskogee, Oklahoma, which the said deceased was a resident and inhabitant of the State of Oklahoma and was buried at Fort Gibson, Oklahoma on July 9, 1944.* *

"That at the time of the death of J. M. Pearl, also known as Maurice O. W. Pearl, he had a living wife whose name was Musetta Wood Pearl, and that both of them were residents and citizens of the State of Oklahoma, and that Section 107, Title 84, Ch. 2, Oklahoma Statutes Annotated, 1941, was in full force and effect and binding on all parties hereto. Which section is in words and figures as follows, to-wit:

'107. *Effect of testator's marriage or issue to revocation.*

'If after having made a will, the testator marries and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survive him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will or in some way mentioned therein as to show an intention not to make such provision; and no (8) other evidence to rebut the presumption of such revocation can be

received. If, after making a will, the testator marries, and, the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will.'

"That Musetta Wood Pearl filed suit in the District Court of the State of Oklahoma, on May 9, 1927, naming Maurice Orpheus Wood Pearl as defendant, same being Cause Number 2631-D, thereafter obtained a judgment granting a divorce on June 30, 1927. Said judgment being based upon service by publication, and thereafter on May 7, 1942, motion to vacate and set aside the purported decree was filed in said cause, and on the said 7th day of May, 1942, by mutual consent and based upon competent evidence said decree of June 30, 1927, was by the District Court of the State of Oklahoma, duly vacated, set aside and held for naught. From that time to the death of J. M. Pearl, also known as Maurice O. W. Pearl, he and Musetta Wood Pearl, were husband and wife, and lived and cohabited together as such in the State of Oklahoma.

"That there is no law in Alaska authorizing the disposal of property by a holographic will and the only way provided by the laws and statutes of Alaska for the making of a valid will are Sections 4611, 4612 and 4640, Compiled Laws of Alaska, and neither of these statutes has been complied with, and the writing offered for probate herein is void and not sufficient as a will or testament under the laws of the District of Columbia, the State of Oklahoma or the Territory of Alaska" (Tr. 13-16, incl.).

A Motion to Dismiss said Amended Petition of said Wood as administrator and heir of said estate of J. M. Pearl, deceased, and a Demurrer to said Amended Petition were filed by the said Paul Greimann as administrator with will annexed and same were overruled by the said probate court on January 5, 1946 (Tr. 19-24).

Answer of Paul Greimann, administrator with will annexed, to said Amended Petition in material part, in substance, alleges:

> "* * that on the 26th day of September, 1931, said J. M. Pearl was, and had been for many years prior thereto, a *bona fide* resident and inhabitant of the Territory of Alaska and had his legal domicile therein, and had no property, real or personal, in the District of Columbia" (Tr. 29-30).

Admits that he is not a relative of J. M. Pearl, deceased, and was never adopted by said decedent; also alleges,

> "That said Paul Greimann, ever since he was of the age of eighteen years, in Chicago, Illinois, had been the intimate friend, and for many years in Fairbanks, Alaska, was, the business associate, of said decedent, J. M. Pearl; that this close friendship continued unbroken up to the time decedent left Fairbanks in December, 1941; * *
>
> "That said decedent during the month of December, 1941, left Fairbanks, Alaska, to secure needed medical attention in the States; that he never abandoned his permanent domicile in the Territory of Alaska, and upon leaving the Territory at the time aforesaid, he fully intended to return to Alaska, and continued in such intention as long as he lived; that shortly after leaving Fairbanks, Alaska, he suffered a stroke of paralysis and became mentally incompetent and was thereby prevented from returning to his home in Fairbanks, Alaska" (Tr. 31-32).

Order and decree of the probate court revoking and setting aside order admitting said letter to probate and denying said letter probation as the will of the said J. M. Pearl (Tr. 35-38).

Notice of Appeal of proponent, Paul Greimann, from order and decree of the probate court revoking and setting aside order theretofore made probating said letter and denying said letter probate as the last will of J. M. Pearl, deceased (Tr. 38-39).

Exceptions of Paul Greimann to order and decree revoking said order probating said letter and denying probation thereto as the will of said J. M. Pearl, deceased (Tr. 40-43).

Decree of the District Court of the Territory of Alaska, Fourth Division

On October 14, 1946 the said District Court made and entered a decree finding and concluding in material part as follows:

> "Wherefore, by virtue of the law and the premises,
>
> "It is Hereby Ordered, Adjudged, and Decreed: That the letter dated 9-26-31 written by J. M. Pearl, decedent above named, in his own handwriting, signed by him, and mailed by him from Washington, D. C., on September 27, 1931, addressed to Paul Greimann, Fairbanks, Alaska, is the true and valid Last Will and Testament of said decedent, J. M. Pearl, and is entitled to probate as such under the laws of Alaska, as heretofore adjudicated on the 6th day of March, 1945, (62) by the Probate Court for the Fairbanks Precinct, Alaska; and said Probate Court is hereby ordered to reinstate said adjudication of March 6, 1945;
>
> "It is Further Ordered, Adjudged, and Decreed That the Order and Decree of said Probate Court made and entered on the 24th day of July, 1946, in the above entitled probate proceeding pending in said Probate Court, numbered 1019, revoking, vacating, and setting aside said Order of March 6, 1945, admitting said letter to probate as the last will and testament of said decedent, J. M. Pearl, upon the ground that said letter

was invalid as an absolute will of decedent and was merely a contingent or conditional Will in its terms and intent, be, and the same is hereby, vacated, set aside, and held for naught.

"It is Further Ordered, Adjudged, and Decreed That the finding and decree of said Probate Court to the effect that said letter is a conditional will and is of no legal force or effect as a last will and testament and, therefore, not entitled to probate as the last will and testament of said J. M. Pearl, deceased, be, and the same is hereby, reversed and set aside" (Tr. 44-45).

Notice of Appeal to the Circuit Court of Appeals, Ninth Circuit, on the part of the said Byron W. Wood

On October 21, 1946, said Byron W. Wood filed notice of an appeal from the said decree in material part as follows:

"I.

"That the Court erred in decreeing a letter dated 9/26/31, written by J. M. Pearl to be the true and valid Last Will and Testament of J. M. Pearl, Deceased, and entitled to probate under the laws of the Territory of Alaska.

"II.

"That the Court erred in vacating and setting aside that certain order of the Probate Court in the said cause, which said order of the probate Court held that the letter, dated 9-26-31 written by J. M. Pearl was a contingent or conditional will and not entitled to probate as the Last Will and Testament of the said decedent, J. M. Pearl (64).

"III.

"That the Court erred in reversing and setting aside the findings and decree of said probate court to the effect that the said letter was a conditional or contin-

gent will and was of no legal force and effect as the Last Will and Testament of J. M. Pearl" (Tr. 47-48).

Filing of Petition for and Allowance of Appeal to the Circuit Court of Appeals

On December 19, 1946, said Byron W. Wood duly filed a Petition for Allowance of Appeal and appeal was allowed from the said decree to the said Circuit Court of Appeals, and appeal bond fixed, filed and approved, and in the order allowing said appeal it is directed:

> "* * * that a certified transcript of records, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said decree appealed from is based, be transferred, duly authenticated to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before thirty (30) days from this date, to be heard at San Francisco, California,* * *" (Tr. 50).

On June 8th, 1947 by order of a judge of the Circuit Court of Appeals, Ninth Circuit, said time in which the record on appeal should be deposited with the clerk of said Circuit Court of Appeals was enlarged so as to include the first day of March, 1947 (Tr. 53-54).

Assignments of Error on Said Appeal

On February 6, 1947 said appellant, Byron W. Wood, filed Assignments of Error in material substance as follows:

> 1. That said District Court erred in taking jurisdiction on said appeal on the part of Paul Greimann from the order of the Probate Court revoking and setting aside the probation of the said letter as the Last Will

and Testament of decedent for the reason that the said order and judgment of the Probate Court had become final and no appeal was properly taken therefrom.

2. "That the Court erred in taking jurisdiction of this case as on appeal when no appeal was properly taken from the Judgment and Decree of the Probate Court under date of July 24, 1946, by anyone having authority or right to take an appeal" (Tr. 55).

3. That the District Court erred in taking jurisdiction on said appeal for the reason that on said purported appeal the record from the Probate Court to the District Court "was insufficient to confer on said Court appellate jurisdiction in this to-wit: *The record contemplated by the Compiled Laws of Alaska, 1933, to be filed in the United States District Court on Appeals, in Probate cases Chapter CLIV Section 4571, 4572, 4573, 4574 was never complied with as (73) the record did not contain the following documents and instruments upon which the United States Commissioner based her judgment of July 24, 1946 on, to-wit:*

"a. The Depositions of Byron W. Wood, Lesta L. Fitch and H. C. Fitch taken in Oklahoma City, Oklahoma, in this cause in which it was established by the uncontradicted testimony that Mr. J. M. Pearl, now deceased, was living with his wife in Oklahoma City for quite some time before he died.

"b. The certified copy of the judgment of the District Court of Oklahoma County, Oklahoma, showing that the divorce decree between the now deceased, J. M. Pearl, and Musetta Wood Pearl, his wife, had been vacated and set aside, restoring them as man and wife; which decree was dated 7th day of May, 1942;

"c. Certified and authenticated copy of the Laws of the District of Columbia as introduced in the trial before the United States Commissioner in this case; which acts controlled the making of wills in the District of Columbia.

"d. The certified copy of the death certificate.

"e. The certified copies of the Letters of Administration issued to Byron W. Wood, by the County Court of Oklahoma County, Oklahoma, in the estate of Maurice O. W. Pearl, who it is shown to be the same man as J. M. Pearl, dated in Oklahoma County July 31, 1945" (Tr. 55-57).

4. That the District Court erred in said decree reversing the said order and judgment of the Probate Judge in which the said Probate Judge found and concluded that the said purported letter heretofore admitted to probate is not an absolute Will and Testament of the said decedent, J. M. Pearl, and is of no legal force or effect and is not entitled to probate. (A copy of the said Order and Judgment of the said Probate Court is inserted in this Assignment.)

5. That said District Court further erred in making and entering said Decree of October 14, 1946, which reversed said above Order and Judgment of the said Probate Court, denying probate of the said letter and erred in finding and concluding that the said letter should be so probated (Tr. 58-60). (A copy of the said Decree of the District Court is inserted in this Assignment.)

Bill of Exceptions

On February 6, 1947 the appellant lodged and filed herein appellant's Bill of Exceptions specifying the same Assignments of Error as are set forth in Appellant's Assignments of Error (Tr. 55-61; Pages 12-13 *supra,* this brief). [Attached as exhibits and parts of said Bill of Exceptions are copies of the said Decree of the said District Court (Tr. 73-75)]; Notice of Appeal; Petition for Appeal; Order Allowing Appeal, and Order Extending Time to File Record and Docket Case on Appeal (Tr. 76-83).

The said Bill of Exceptions contained the following material evidence of Paul Greimann stated in narrative form:

> "That he knew J. M. Pearl, the deceased first back about 1919, in Chicago, Illinois. Formed a friendship with him. Was associated with him up to 1930, was acquainted with him three years before coming to Alaska. Came to Fairbanks together, opened up the Pearl and Pearl Garage.
>
> "Mr. Pearl was about 19 years older than the witness. The witness was about forty-three years old when Mr. Pearl died. He continued his friendship with him during his lifetime in Fairbanks. He lived out here on a farm that was bought by both he and I from Harry J. Busby in the winter of 1924, and owned by J. M. Pearl up to the time the army took it away from him here six years ago, or five years ago. *In 1930 we had a dissolution of partnership.* I bought out his equity in the Standard Garage and bought out the property on the corner of Lacey Street between First and Second. I transferred to him half of the 318-acre farm out there, which he contributed to the purchase thereof. I transferred to him one-half of the 318 acres, which is about three-quarters of a mile from Fairbanks. He lived there. Built a home there. It was taken over by the United States Army.
>
> "He left here to go to the States about six years ago, about the first of November. He was in ill health. He went to Oklahoma. Received a letter from him from Council Hill, Oklahoma, stating that he had gone to Council Hill. We had always been on friendly terms. I used to go back and forth to his place out on the farm, and he used to come into the business whenever he came into town to say 'hello,' sometimes he stayed an hour or so. He still regarded me in a friendly manner, and I regarded him the same way. I think it was through my recommendation that he left. He wasn't looking any too good and said he wasn't feeling good. I told him I didn't see any reason why he should stay up here in the cold weather in the winter, and I says

'why don't you pack up your clothes and go outside for the winter?' That was the last trip outside. He went outside in 1931 for medical attention. He was in a hospital in Washington, D.C. He was a veteran of the Spanish-American War. After he was released from the hospital he came back to Fairbanks.

"In September I received a communication from him, a letter through the mail, addressed to Paul Greimann, that letter is what this proceeding is based on.

"He had no relatives here in Alaska. The only relatives that he had was, that he made mention of, was his brother Byron. That I never had any dealings with Byron Wood.

"That I based my claim to the estate on this letter.

"That this letter was in the handwriting of J. M. Pearl. That he and Pearl were in the garage business from '24 conducted under the name of Pearl and Pearl for some time. He suggested that I adopt his name. He called me son. I never adopted the name of Pearl, was always known as Greimann. We were always very friendly except when I got married, he disapproved of my getting married. 'He thought I should have asked him to get married, and there was a little dissension between he and I at that time.' 'However, while he never cared much for my wife, or liked my wife very well, so far as that was concerned I think we were always on friendly terms.' No open break between us. When I got the letter above referred to I put it in my safe in the garage. When he died I waited some time to see if anybody would be appointed to take care of his estate before application was made. 'I figured that if he was in Council Hill and his brother was there that he must have—I at least thought that I would have had some kind of a wish or some kind of a tip that he wanted his brother to handle it, so I figured that at any time we might receive that notice, so therefore I never entered into it until there wasn't anything showed up.

"His was farm land separated off in lots and some being sold for homes out there. He was engaged in the

real estate business to the extent of selling a portion of his property that he had acquired personally.

"On cross-examination by Mr. Taylor. He testified that he was no relation to J. M. Pearl. That as he recalled Mr. Pearl returned to Fairbanks the next spring after he went out for medical attention in 1931. Don't recall that he ever said anything about the letter he had written, relied upon here as a will. That Mr. Pearl told him he had a wife living in Oklahoma. He also said he was divorced. He came back to Fairbanks in '32. He assumed jurisdiction and control of his property from then on up until the time he left. He did seek me for advice at times, but he made the final disposition of anything pertaining to his affairs. He advised me about having a brother in Oklahoma at Council Hill. Mr. Pearl never advised the witness that the divorce decree was set aside and of his resuming martial relationship with his wife.

"I believe he died July 8, 1944. That he relied upon the part of the letter that states, 'and in case I die if they do operate I bequeath you my belongings and property,' to be the last will and testament. He was not operated on at that time and couldn't, then, have died from the operation. He died from paralysis in 1944. We divided the 318-acres of land, he took his half and I took mine. He assigned over his interest down *were* the garage was to me; that was in 1930.

"On redirect examination of Mr. Greimann by the Court: He testified that he and Mr. Pearl came to Alaska, in 1923, established a home here in Fairbanks and voted at the elections. He never *abandon* that home to the knowledge of the witness. When he went outside to the hospital he said he would be back as soon as he—he came back and continued to vote at the elections.

"The next time he went out was 1940. He had had a slight stroke a couple of years before that and his health wasn't any too good, and he would have to pack the wood out there, and so forth, out there on the ranch, and I said, 'there is no use of you staying here.

You have plenty to take care of yourself. Why don't you go outside?' And he said, 'I don't know but what I will do that.' He said, 'It will save a lot of anxiety,' and then, he says, 'nobody will have to come out and be looking after me all of the time in the wintertime to see that I have plenty of fuel.' So about a week after that he left. He left his home and everything here. I heard from *his* later, he said he intended to come back the following spring. He said he had bought a small house and small track of land, about five acres in Oklahoma. That it was nice and warm out there, and that he was enjoying the climate very much, but that he would be back in the spring. That would be the spring of 1941. It appears that he took sick shortly after he wrote this letter because I didn't receive any communications from him afterwards, with the exceptions of a postcard of some scene around Oklahoma City. He ask me why I didn't write; he hadn't heard from me for a long time; and that was the last communication I received. I never kept either one of them. I think the next I heard was through Mr. Clegg here, that he was ill. That was about three years ago this summer.

"When I got back from the outside I learned of his death on July 8.

"He had property in Alaska when he wrote the letter in 1931, and had property here at the time of his death. The property had been taken by the army at the time of his death and money had been deposited in Court in payment of it; around $10,000.00. They had taken the land in 1941. The only part of the estate that existed here was the money deposited in the Court. I never made inquiries about the Oklahoma property.

"On cross-examination of Mr. Greimann by Mr. Taylor: He testified that he didn't know that he resided in the State of Oklahoma with his wife. He didn't return to the Territory of Alaska. I think he was in a veteran's hospital in Muskogee.

"On further examination of Mr. Greimann by the Court: He testified 'that he died in a Veteran's Hospital in Muskogee, Oklahoma. He went in there shortly after he left Alaska, must have been some time in the spring of 1941. He *know* my children and was fond of them. It was his habit to give them a dollar on their birthday, if he knew when it was or if it was mentioned. He continued to call me 'son' always or 'Paul, boy.'

"In the letter above mentioned he called me, 'Dear Paul, boy,' and he signed it as 'J. M. Pearl' or 'Dad,' because I always called him 'Dad,' sometimes he signed it just 'Dad,' and this letter was signed dad and J. M. Pearl.

"Further cross-examination of Mr. Greiman by Mr. Taylor: That sometimes he signed J. M. Pearl and sometimes J. M. O. W. That he was in the probate court in Fairbanks when the depositions were read" (Tr. 66 to 73).

Said Bill of Exceptions set forth recitals, rules of the District Court of Alaska, and statutes as follows:

"XIV.

"Thereafter, and on the ____ day of February, 1947, this appellant, Byron W. Wood, filed Assignments of Error, which are incorporated in the Transcript and made a part of this Bill of Exceptions by reference as fully as if set out herein.

"XV.

"On the 19th day of December, 1946, Appeal Bond was duly filed herein and is set out in the Transcript of the Record and made a part of this Bill of Exceptions by reference as fully as if set out.

Praecipe for Transcript of Record and Citation to Paul Greimann to Appear and Defend herein in the District

Court, Ninth Circuit, and Return of Service thereon filed February 21, 1947 (Tr. 86 to 90).

Transcript properly certified setting forth all of the above filed February 24, 1947 in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit (Tr. 95-96).

SPECIFICATION OF ERRORS AND STATEMENT OF POINTS OR PROPOSITIONS RELIED UPON FOR REVERSAL

1. That the District Court of Alaska, 4th Division, erred in setting aside and vacating the order and judgment of the Probate Court, which denied the probation of said letter written by J. M. Pearl, deceased, to Paul Greimann and in decreeing that the said letter should be probated as the will of the said J. M. Pearl, deceased.

2. That the District Court of Alaska, 4th Division, erred in holding that said letter propounded herein as the will of the said J. M. Pearl, deceased, was general and not contingent, and that its operation as a will was not contingent on the death of the author as the result of the impending operation.

3. That the letter propounded herein for probate as the will of the said J. M. Pearl, deceased, shows on its face that it was written in a hospital in Washington, D.C., to the proponent, Paul Greimann, in Fairbanks, Alaska, and dated September 26, 1931, at which time said Pearl was a patient in said hospital, and an immediate operation on said Pearl was planned, and with regard to the said opera-

tion said Pearl wrote said Greimann "In case I die if they do operate, I bequeath my belongings and property," etc., "I would ask to be buried in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of October, or soon after," etc., and as appears from the said letter the said bequest and request were contingent and conditional upon the death of the said Pearl resulting from the said impending operation, and it appearing from the record herein, and it being admitted, that the operation was not performed, and that the said Pearl did not die from any operation but survived thereafter 13 years, said letter was not entitled to probate and the said District Court of Alaska erred in setting aside and vacating said order and judgment of the Probate Court denying the probation of the said letter and in decreeing that the said letter be probated as the will of the said J. M. Pearl, deceased.

The above three specifications, being closely related, and supported by the same reasoning and authorities, will be discussed together to save burdening this brief with repetition.

The task presented in the case at bar, being the consideration of the pertinent and controlling language of the letter, and applying thereto the above stated well settled rules in determining as to whether the letter should be held to be a contingent will, and not entitled to probation, it is obvious that a thorough and careful study and analysis of said language of the letter ranks first.

MATERIAL PARTS OF THE LETTER PROPOUNDED AS A WILL

Said letter shows on its face that it was written to the proponent in Fairbanks, Alaska, from a hospital in Washington, D.C., on September 26, 1931, where the author was a patient, and at the time an operation was planned and impending. The letter set forth at length the author's ailments, symptoms, attending physicians, and the necessity for the performance of the operation, and in reference thereto states:

> "We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, *and in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education. I would ask to be buried here in Arlington Cemetery.* I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly" (Tr. 5-6). (See letter in full pages 4-6 Transcript.)

As is alleged in the pleadings of both parties, and admitted, the author of the letter was not operated upon, and did not die, and shortly after writing the letter returned to his home in Alaska where he remained and engaged in business for approximately ten years and then returned to his former home in Oklahoma in 1941, and thereafter remained in Oklahoma and died in Oklahoma on July 8, 1944, some thirteen years after the said letter was written.

In said letter the directly and clearly stated contingency or condition precedent to the operation of the letter as a testamentary instrument was *"In case I die if they do operate I bequeath you my belongings,"* etc., *"I would ask*

to be buried in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of October, or soon after." It is obvious that this bequest and request were provisional and contingent upon the two stated conditions or events. It is clear that the bequest was not immediately in effect. The author of the letter did not write that he thereby bequeathed his property without condition, but specifically conditioned the gift to be operative *"In case I die if they do operate."* This letter cannot by any reasonable interpretation be made to speak of the time of the death of the author when it occurs 13 years later under changed conditions. The urge for writing the letter was the impending operation and the language used specifically expressed conditions precedent to its operation. These conditions or events did not occur and the letter never became effective as a will.

POINTS AND PROPOSITIONS IN RELATION TO THE ABOVE SPECIFICATIONS

1. The letter presented for probate as a will shows on its face that it was written by J. M. Pearl in a hospital in Washington, D.C., to the proponent, Paul Greimann in Fairbanks, Alaska, and dated September 26, 1931, at which time said Pearl was a patient in said hospital, and said letter specifically detailed Pearl's afflictions and treatment and advised that an operation was impending, and with regard to the said crisis said Pearl wrote said Greimann: *"in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher*

to help him in his education. I would ask to be buried in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly"; that said bequests and requests were contingent and conditioned upon the death of the said Pearl resulting from said impending operation; and it appearing from the record herein, and being admitted, that the operation was not performed, and that the said Pearl did not die from any operation, but survived and lived thereafter for some 13 years, and died in the State of Oklahoma, the said District Court of Alaska erred in setting aside and vacating said order and judgment of the Probate Court denying the probation of the said letter and in decreeing that said letter be probated as the will of the said J. M. Pearl.

2. The District Court erred in vacating and setting aside the order and decree of said Probate Court denying probate to the said letter so presented for probate and decreeing that the said letter be probated as the will of the said J. M. Pearl, deceased, in that the said letter shows on its face that same was written to said Paul Greimann in a crisis and not intended as a general will, and that the gifts therein mentioned to said Greimann and Robert Gallagher were clearly contingent and to be operative only in the event the impending operation on the author of the letter was performed and caused the death of the author; that said planned immediate operation was not performed, and the author recovered and returned to his home in Alaska

and resided in Alaska some 10 years, engaging in business there, and thereafter removed to the State of Oklahoma and resided in Oklahoma approximately three years before his death; *and that neither the author of the said letter nor the said Greimann or Gallagher referred to or mentioned the said letter during the said thirteen years.*

PERTINENT CONTROLLING PRINCIPLES AND RULES AS TO CONSTRUCTION AND CLASSIFICATION OF TESTAMENTARY INSTRUMENTS

1. That a contingent will is one which is dependent on a stated contingent event or condition, and the happening of which is a condition precedent to the operation of the instrument as a will, is so well settled as to require no supporting authority. From early times in England and the United States the distinction between contingent and general testamentary instruments has been clearly recognized.

2. The controlling rule is that where the language of the instrument clearly conditions its operation on the happening, or on the not happening, of any event or condition, the will is contingent and is inoperative or void where the event or condition does not occur.

3. The rule is also well settled that the test as to whether a testamentary instrument which refers to the probability of the death of the testator occurring under certain circumstances, or as the result of a certain event or peril, is to be adjudged contingent or general on the death of the testator, depends on whether the same were referred

to as narrative and the inducement for making the will, in which event the will is not contingent on death occurring under the referred to circumstances, or whether the circumstances or events are referred to as the reason for making the particular dispositions and the circumstances are so related to each other that the one is dependent on the other, the will is contingent upon the occurrence of the said circumstances.

4. The above rules of construction and classification of testamentary instruments are equally applicable to writings in the form of wills as to letters in the nature of holographic wills, whether preserved by the author or by another, except that, as to letters, same being usually of a temporary nature, the facts and circumstances existing, and subsequently occurring, and the attitude and actions of the parties with relation to the letter after the referred to events failed to occur, are proper considerations.

5. The rule of presumption against intestacy cannot be used to justify a revision of the clear language of a testamentary instrument.

While, as is stated in many of the authorities, the distinction and classification of testamentary instruments, as to being contingent or general, depends upon the language of each particular instrument, and while two such instruments seldom are perfectly identical in language, the examination of the opinions of the courts analyzing and construing the language of and classifying such instruments should prove helpful in the case at bar. In that belief the

leading authorities most nearly in point are hereinafter cited, quoted and applied.

In *Dougherty* v. *Holscheider*, 88 S.W. (Tex.), 1113, two letters were proponded for probate and the lower court admitted and ordered same probated; however, on appeal the Circuit Court of Appeals reversed the decree and refused probation. As appears from the opinion Raf Welder wrote said two letters to J. R. Dougherty, which were in material part as follows:

> "Hebronville, 4-12-1902.
>
> "* * * Friend Jim, I am going to start to Montery to-morrow to have a surgical operation performed on me, and possibly I may never get back alive. I will write you full particulars as to what to do with my stuff when I get there. *The doctors have said that it would not be dangerous;* but, in case anything should happen, I want you to see to what I have left. * * *
>
> "Monterey, Mexico, 5-6-1902.
>
> "Mr. James R. Dougherty, Beeville, Texas—Friend Jim: I wrote you some weeks ago, and told you that I intended undergoing an operation, and that before doing so that *I would write you and tell you what to do with my stuff, in case anything happened to me. I expect to be operated on tomorrow.* * * * *While I don't anticipate any danger,* as the Dr. has assured me that there is no danger, yet *there might be,* and I think this will fully explain to you my wishes. * * *"

The probation was protested on the ground that the contingency did not arise. Raf Welder did not die as the result of the operation and not until about two years after the letters were written. In the opinion it is further stated:

> "* * * The letters written by Raf Welder to J. R. Dougherty have the essentials necessary to constitute

a will under the statute, and, *unless the will was to take effect only upon the fatal termination of the operation referred to therein, it should have been probated by the district court.*

"A will which is to become effective only upon the happening of a contingency is a contingent will, and in case the contingency does not arise is by the failure of the happening of the event annulled and revoked. There are numerous cases, English and American, involving the construction of wills in which contingencies were expressed, for it seems to be very common for those unlearned in the law, who write their own wills, to do so under the influence of the fear or expectation of imminent peril and consequent death; but an infallible guide for their construction is difficult to be evolved therefrom. The current of modern authority, however, seems to be that, if the happening of the event is merely referred to as giving the reason or inducement for the making of the will, it be held unconditional; *but, if it appears that the testator intended to dispose of his property in case of the happening of the named event, then it will be held to be conditional.* * * *"

After citing and quoting from English and Federal and State cases wherein the language of the instrument was "if I never get back" or "should anything happen to me," without referring to any specific event or occurrence as a condition precedent, the court distinguishes such cases from the case being decided and quoted the above set forth controlling language of the letters limiting the operation of same as the result of the operation referred to, just as did the letter in the case at bar and concluded that the letters were contingent as follows:

"* * * *We think the words of the letter indicate clearly that it was written merely as an expedient in case of death resulting from the operation.* In both

letters he desires certain things done 'in case anything happened,' evidently in connection with the operation. The words bring it clearly within the purview of cases holding that the wills were contingent on the happening of certain events. *Morrow's Appeal* (Pa.), 9 Atl. 660, 2 Am. St. Rep. 616, in which the authorities are cited."

The will construed in *Phelps* v. *Ashton* (1867) 30 Tex. 344, commenced as follows:

"Know all men by these presents that I, H. C. Ashton, Sr., being on the eve of leaving home for an indefinite time, and not knowing what Providence may ordain during my absence, do make and will this request in case of my death while absent."

The court held that this was a contingent will, and hence inoperative where the testator died at home, or after his return from the proposed absence.

In *Ferguson* v. *Ferguson*, 45 S.W.(2d) (Sup. Ct. Tex.) 1096, relied upon by the appellee, the holdings in the above Texas and other cases cited herein are approved, but the court holds the language was not contingent as clearly appears in the opinion. The language of the will in this *Ferguson case* was:

"Haskell, Texas, May 5, 1924.

"I am going on a journey and I may never come back alive so I make this Will, but I expect to make changes if I live."

The court held that said language was not contingent as follows:

"The decision of this case must mainly turn upon the construction to be placed upon the first sentence which reads: 'I am going on a journey and I may never

come back alive so I make this will, but I expect to make changes if I live,' and the second sentence, which reads: 'First, I want a Hospital built in Haskell in memory of my husband Francis Marion to cost $50,000 (Fifty Thousand Dollars), if I live I expect to have it done myself.'

"There is no express provision that the will shall be contingent upon the death of the testatrix upon the particular journey referred to. If this intention existed in the mind of the testatrix and was carried into the will, it must be gathered mainly from a construction of the two sentences mentioned. * * *"

After in substance stating the controlling principles and rules of construction and classification of testamentary instruments to be in substance as stated above, the court further stated and held:

"Mrs. Morton did not say in her will: 'This Will is to be effective if I die on this trip.' She refers to it as her 'Last Will,' and makes the following bequests: * * * etc.,

"This was the 'Will' in which she 'expected' to make 'changes' if she 'lived.' *The making of changes in a written paper called a will presupposes the continued existence of the paper as a will.* One cannot 'change' something that has ceased to exist. Mrs. Morton was going on a journey; she did not want to die intestate. She wrote unskillfully a document and called it her will, and notified the world that she expected to change it if she 'lived'; *not that if she returned alive from the trip she intended to die intestate unless she wrote another will, or that upon her safe return this will would be null and void.* * * * The declaration by the testatrix that she 'expected' to make 'changes' is not equivalent to declaring the will null and void if she survived the journey or that it was contingent upon her death on that trip. This declaration indicates that she had published a will, the details of which did not exactly suit her, and she pro-

posed to change these details and possibly put the document in better legal form.

"These conclusions do not conflict with *Dougherty* v. *Holscheider,* 40 Tex. Civ. App. 31, 88 S.W. 1113, 1114, *Vickery* v. *Hobbs,* 21 Tex. 571, 73 Am. Dec. 238 , or *Phelps* v. *Ashton,* 30 Tex. 345, and in our opinion the conclusion reached by a majority of the Court of Civil Appeals results from an incorrect application of the principles announced in those cases to the language of Mrs. Morton's will. It was said in the *Doughtery case*:

" 'In most of the cases holding wills dependent on the happening of the condition named, the words, "if I never get back," referring to a certain journey, or "should anything happen to me," referring to a particular time or event, were used.'

"There are no express words expressing a condition in Mrs. Morton's will such as: 'If I die on this trip,' 'If anything happens,' or the like. Not containing the words of condition, her will does not fall within the rule announced in the *Dougherty case* where the words were 'in case anything should happen.' * * *"

It is obvious that the opinion in this *Ferguson case* approves the holdings in the cases of *Dougherty* v. *Holscheider, Vickery* v. *Hobbs,* and *Phelps* v. *Ashton,* presented in this brief on Pages 26-27, *supra.*

The opinion in *In re: Forquer's Estate,* 216 Pa. 331, 66 Atl. 92, was relied upon by the appellee in the case at bar as supporting the probation of the letter here involved; *however when the material difference in the language of the letters is considered and said opinion and supporting authority cited therein are analyzed the holding therein is to the contrary.* The instrument presented in the case for probate was a letter, and the narrative and induce-

ment stated by the testator is in substance such as usually appears in wills, being. "I intend starting tomorrow to Bozeman, Mont.—knowing the uncertainty and risk of the journey, know all persons that I do hereby will and bequeath all my property," etc., "and should anything befall me while away *or that I should die,* then in that event all my estate * * * are hereby assigned, conveyed and set over to my wife * * *."

After stating the applicable rules of construction to be in substance that, if the inducement stated in the will is simply referred to as the occasion for making the will at that time; that if the language used in the will can be reasonably construed that the testator refers to a possible danger as the occasion and not the reason for making the will; the will is not contingent and that to render a will contingent or conditional it must appear from the language that it was to only operate in the event of the occurrence of a said event, the court illustrated the application of said rules by citing and discussing cases as follows:

> " 'Reference to a few of the many cases cited by counsel will indicate how those rules, have been applied by the courts. In *Todd's Will,* 2 Watts & S. 145, written in contemplation of a journey, as follows,' 'My wish, desire and intention now is that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows,' etc., it was held that, on his return and subsequent death, the will was contingent. In *Hamilton Estate,* 74 Pa. 69, the language, 'Should I die before the first of March, 1873,' etc., was held to be the expression of a contingency which prevented the operation of the instrument after the event failed to happen. *In Morrow's Appeal, 116 Pa. 440, 9 Atl. 660, 2 Am. St. Rep.*

616, (See Pp. 35-38 Ante) Morrow when about to go from home, wrote and signed a testamentary paper, beginning as follows: 'I am going to town with my drill and i aint feeling good and in case i shoulddend get back do as I say on this paper,' etc. He returned, but died soon afterward in the same illness. The will was held to be contingent. * * *In *Magee et al.* v. *McNeil,* 41 Miss. 17, 90 Am. Dec. 354, the will of a soldier in the Confederate army contained the following expression: 'If I never return home I want all I have to be my wife's.' On his return and subsequent death the will was held to be contingent. In *Damon* v. *Damon,* 90 Mass. 192, the will contained the following: 'I, J. W. D., being about to go to Cuba, and knowing the danger of voyages, do hereby make this my last will,' etc. 'First: If by casualty or otherwise, I should lose my life during the voyage, I give and bequeath to my wife, A.,' etc. He then went on to give other specific devises. Held, conditional as to first clause of the will. In all the foregoing cases it will be observed that the contingent character of the instrument or devise stands out clearly.

" 'Adverting to some of the cases in which wills claimed to be contingent have been held not to be so, the following may be noted: In the Goods of George Thorne, 4 Swab. & Trist. 36, the will, dated at the Gold Coast of Africa in 1863, contained the following: 'Be this known to all concerned: I request that in the event of my death while serving in this horrid climate or any accident happening to me, I leave and bequeath to my beloved wife,' etc. 'I consider that every person should be prepared for the worst and especially in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter.' It was held not contingent on the death on the Gold Coast. * * * In *Tarver* v. *Tarver,* 34 U.S. 174, 9 L. ed. 91, the will begins as follows: 'Being about to travel a considerable distance and knowing the uncertainty of life, think it advisable to make some disposition of my estate,' etc. Held not contingent. * * * In *Likefield* v. *Likefield,* 82 Ky. 589, 56 Am. Rep. 908, the language, 'If any

accident should happen me that I die from home, my wife, J. A. L., shall have everything I possess,' was held to render the will inoperative or contingent. * * *

"Applying these rules to the will of William A. Forquer, it may be observed, we think, *that its first portion contains no hint that its provisions were in any way contingent.* * * *

" '* * * Can the will as a whole, by any reasonable interpretation, be made to speak as of the time of testator's death whenever it might occur; or does it, *on the other hand, clearly appear from the will itself that it was only intended to become of effect in the event of testator's death during his contemplated journey?* These reasons impel us to a conclusion in favor of the former proposition. These are: (1) Testator's evident solicitude for his wife, apparent in the will. (2) We do not think that the contingency expressed in the will was intended to undo or destroy the absolute character of the dispositions already made therein. (3) The language used to express the contingency does not clearly lead to the conclusion that it was intended to render the will contingent in its operation. It may, on the other hand, be reasonably construed in favor of an absolute will. * * *

"* * * In the case before us the language expressive of the contingency is, 'and should anything befall me while away or that I should die,' etc. *The expression 'should anything befall me while away,' standing alone, is clearly contingent.* It evidently refers to the possible death of the testator while away, as no other event could befall him which would give effect to the disposition of his estate which he was then making. The testator would have expressed the same thought had he said, 'and should death overtake me while away.' It clearly refers to his possible death while on his journey. We may well suppose that the testator, by the disjunctive expression which follows, *'or that I should die,' meant to add something to what he had already said. He had already provided for the con-*

> *tingency of death while on the journey. We may assume that he meant to add something by the use of the language which followed, and, if so, that he meant to make provision against the event of his death whenever it might occur.* By the use of the disjunctive 'or,' the provision which follows excludes the thought that immediately preceded, and has, we think, the same force and meaning as if it stood alone. * * *"

It will be noted that the holding in *Morrow's Appeal, Ante,* Pages 36-38, also a Pennsylvania case, and other cases in point in the case at bar are approved. It will be further noted that the case of *Tarver* v. *Tarver,* 9 Pet. 174, 9 L. ed. 91, also relied upon by appellant is not in point. In this *Tarver case* the will propounded was duly executed on May 3, 1919 and contained the opening statement:

> " 'Will. In the name of God, amen! Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament. * * *' "

Said Richard Tarver died in 1927. While several other questions were raised and discussed in the opinion the portion of the opinion relative to the question here presented as to whether or not the will was contingent is as follows:

> "* * * There was no evidence impeaching this will, except what appears on the face of it, and is rested entirely on the introductory part of it. It begins in this manner: *'Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament,' etc.*
>
> "And it is contended that the condition upon which the instrument was to take effect as a will, *was his*

> *dying on the journey, and not returning home again.* But such is a very strained construction of the instrument, and by no means warranted. It is no condition, but only assigning the reason why he made his will at that time. *But the instrument's taking effect as a will is not made, at all, to depend upon the event of his return or not from his journey.* There is no color, therefore, for annulling this will on the ground that it was conditional. * * *"

In *Wilson et al.* v. *Higgason et al.*, 178 S.W. (2d Ark.) 855, the propounded instrument was a letter dated March 10, 1929, and mailed to the addressee, and the material part thereof read as follows:

> "* * * 'I want you, in event that I should die any time soon, to collect all my insurance and if I have any money left anywhere I would want you to get it all together and divide it equally * * *' " etc.

The author of the letter died September 8, 1941, more than 12 years after the letter was written, and the court cited *Walker* v. *Hibbard*, 215 S.W. (Ky.), 800, and concluded as follows:

> "* * * we are of the opinion that the writing here offered was properly rejected for probate as a will for the reason it was a contingent or conditional will, wherein the contingency or condition did not happen as provided therein. Contingent wills are those 'drawn to take effect only upon the happening of a specified contingency; * * * Such a will is operative if the contingency happens or occurs, but its operation is defeated by the failure or non-occurrence of such contingency, * * *.' 68 C.J. Sec. 256, D. In 28 R.C.L. P. 166, Sec. 121, it is said: 'A conditional or contingent will is one to become effective upon the happening of a specified condition or contingency. When a will is limited in its operation by conditions that defeat it before the death of the testator it is void unless re-

> published by the testator. Once defeated by its own limited conditions, its mere possession and preservation by the testator until his death does not amount to a republication.' "

Where the word "if" is used in a testamentary instrument, as in the case at bar, to introduce a specifically stated condition or event, the word must be held to mean "in that case" and to express the condition or event which must arise or occur as a condition precedent to the operation of the instrument as a will, is the holding of all the authorities.

Noting that the letter in the case at bar is an "if" letter, and specifically states: "in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education," we present as controlling authority cases directly in point holding that such letters are contingent and not entitled to probate as follows:

In *Morrow's Appeal,* 9 Atl. Rep. (Pa.) 660, the controlling question was as to whether a holographic will, which in the first sentence stated: *"I am going to town with my drill and i aint feeling good and in case if i shouldend get back do as i say on this paper,* * * *" *was contingent and conditioned on testator not returning.* The testator returned home and did not die until later and the court held that the will was not entitled to probate. In so holding the Supreme Court of Pennsylvania quotes at length the opinion of the orphans' court refusing probate to the said instrument, which cites and quotes at length from many prior opinions, *Jarmin on Wills* (5th Amer. Ed.) 28, and

Walker on Wills, Section 257, and holds and concludes therefrom as follows:

> " '*The foregoing cases illustrate very fully the difference between the contingency which furnishes the occasion or motive, and is given as the reason for making the will at that particular time, and the contingency upon which the instrument is to take effect,—the contingency which must happen before the instrument becomes a will at all.* It is the certainty of death, and the uncertainty of the time thereof, that leads to the making of a will. The undertaking of a perilous journey, or the probable exposure to more than usual accidents, may furnish the occasion for making a will at a particular time; but, although the time of making has been hastened by the apprehension of danger, the testator does not consider the instrument inoperative, or regard any further disposition necessary merely because the danger has been survived. *When, however, the ordinary uncertainties of human life have not been carefully provided against, and circumstances may now postpone the opportunity for doing so, a crude instrument of testamentary character is sometimes made to bridge over the chasm, and become operative only upon some designated contingency, which shall prevent the execution of a maturely considered will.*
>
> " 'It is objected by his administrators, against the writing left by Thomas W. Morrow, that it belongs to this latter class; that it is a contingent will; and, the contingency not having happened, that the will is void. *They rely upon the Case of Todd's Will,* 2 Watts & S. 145. And it was upon the authority of that case that the register refused admission to probate. The will of George Todd began as follows: ' '*My wish, desire, and intention now is that, if I should not return, (which I will, no preventing Providence,) what I own shall be divided as follows,'* etc. " 'Chief Justice GIBSON refers to the cases of *Parsons* v. *Lanoe* (1 Ves. Sr. 190) and *Sinclair* v. *Hone* (6 Ves. 608), * * * in which the wills were held to be contingent.' '*But,*' he says, ' '*an intention to make the operation of*

the papers eventual is not near so apparent in either of these cases as it is in the one under consideration;' ' and the judgment of the court below refusing probate was affirmed. In the case at bar, we think the will illustrates both sorts of contingency: *that which urged to the present making of the instrument, and that upon which the instrument itself was to take effect.* ' '*I am going to town with my drill and I ain't feeling good,'* ' *was the contingency suggesting the propriety of making the will.* ' '*And in case if I shouldend get back do as I say on this paper,'* ' *contains the contingency upon which the will should become operative.* It is very clear that the will is not *presently operative.* He does not say, ' 'I hereby give and bequeath.' 'There is no immediate gift. He does not say absolutely, ' 'Do as I say on this paper.' ' *Some* time, at least, *must* elapse after his departure for town before any such duty is imposed. The command is provisional: ' '*If I shouldend get gack do* as I say on this paper.' ' It is plain *that his failure to return* is the condition precedent required before the instrument can become effectual. *If it was ineffectual until there was a failure to return, and if there was no such failure, it is also plain it never became effectual; that it was a contingent will, and became void by the non-happening of the contingency.*

" 'In Todd's will the expression is: ' 'If I should not return, what I own shall be divided as follows.' ' In Morrow's will the expression is: ' 'If I shouldend get back do as I say on this paper.' 'If I should not return,' ' and ' 'if I shouldend get back,' ' are forms of expression so plainly equivalent that we are unable to see any distinction or difference between them.' "

It will be noted from the above that this *Morrow case* is perfectly in point in the case at bar, and the urge for writing the letter was the planned operation, and the contingency upon which the gift was to take effect was specifically stated.

It was shown in *Todd's Will* (1841), 2 Watts & S. (Pa.) 145, cited and quoted in the above *Morrow case,* that the testator, in contemplation of a journey to another state to recuperate in health, made a will reading, in part, as follows: *"My wish, desire, and intention now is that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows."* The testator returned in bad health, but able to attend to business, and died about a month later. The court refused probate of the will, holding that it was contingent and not intended to operate in the event of the testator's death at home.

It appeared in *Sinclair* v. *Hone* (1802) 6 Ves. Jr. 607, 31 Eng. Reprint, 1219, that a man residing with his wife in Dominica, in contemplation of a trip to England, executed a codicil reading as follows: *"In case I die before I join my beloved wife, I leave to her all my property,"* etc. It appeared that the testator missed the boat, returned to his home, and lived with his wife until they both together left the island for England. Subsequently, the testator died in Corsica. The court held that the codicil was contingent and never took effect, since the testator rejoined his wife.

In re: Poonarian's Will, Marlowe et al. v. *Illwanian et al.,* 224 N.Y. 227, 137 N.E. 606, a case perfectly in point in case at bar, the court held the will was contingent and not entitled to probate. The instrument was properly executed as a will, but the bequests therein stated were preceded by the language: *"if anything happens to me in Con-*

stantinople or in ocean." In the opinion it is stated and held:

> "* * * The contestant is a half-brother, who claims that upon the face of the instrument it is clearly conditional, and that, the condition not having happened, the paper is no longer a will.
>
> "In our judgment this will was to take effect as the last will and testament of Hagop Poonarian *only in case anything happened to him while on his trip to Constantinople. As he returned to his home in Rochester in safety and the condition was never met or fulfilled, this paper ceased to be a will, and was not the will of Poonarian at the time of his death in 1920.* We are led to this conclusion by the few simple rules which govern matters of this kind. In the first place it is an underlying principle that we must take what the maker himself says in the instrument, without changing language, punctuation, or grammar to carry out what we may think was intended. Safety lies in giving to the words used by the testator their natural and everyday meaning, and stopping here if they be intelligible. In this supposed will, we find Poonarian stating that his property consists of rugs which he gives, share and share alike, to his four sisters 'if anything Happen to me in Constantinople or in ocean.'
>
> "* * * The *word 'if' is used to introduce a condition or supposition. It means 'in that case.' No word that I can think of more clearly expresses a condition which may arise unless the word 'condition' itself is used.* The testator could have said 'in case anything happens to me in Constantinople or on the ocean' or he could have said 'on condition that anything happens to me in Constantinople or on the ocean,' but these phrases all mean the same thing, and in our judgment clearly indicate that the testator intended to give his rugs in the storehouse to his sisters only in case he died on his trip to Constantinople. * * *
>
> **"As this alleged will specifies the particular journey which was to be undertaken, and gives no indication on its face of**

a general disposition to be made of the testator's property in any event, we are inclined to think that the mention of the trip to Constantinople was not merely an inducement for the making of a will, a suggestion or reminder to the testator of the uncertainty of life, whereby he disposed of his property in any event, but was mentioned as a contingency, a chance that he might meet death on the trip, in which case he willed his property."

In support of this construction and holding that the will was contingent and not entitled to probate the court cites:

> *Eaton* v. *Brown,* 193 U.S. 411, 24 Sup. Ct. 487, 48 L. ed. 730;
> *Alexander's Commentaries on Wills,* Sec. 106, 113;
> *Maxwell* v. *Maxwell,* 3 Metc. (60 Ky.) 101;
> *Dougherty* v. *Holscheider,* 40 Tex. Civ. App. 31, 88 S.W. 1113;
> *Oetjen* v. *Diemmer,* 115 Ga. 1005, 42 S.E. 388;
> *Robnett* v. *Ashlock,* 49 Mo. 171.

In re: Cook's Estate, 150 Pac. (Cal.) 553, three letters were propounded for probate, the lower court admitted same to probate, and the appellate court affirmed the decree. As to the material parts of the letters the court in the opinion states:

"* * * In the letters the deceased uses the expression, 'If I should die from the operation,' and 'In case I do not live through the operation,' and 'I have reason to believe I will not live through it,' and the instructions are to be carried out 'only in case I do not live' and 'I want you to see it is done in case of my death only.'

"As to the operation: The deceased went to the hospital on April 26, 1915, and the next day an opera-

> tion was performed on her. When she was taken to the hospital she was in a weak and debilitated condition. She did not at all improve after the operation; she never recovered her strength, but grew gradually weaker. After remaining three weeks in the hospital, she was taken home, where she still continued to fail, and a week afterwards, on May 26, 1915, she died, just a month after the operation was performed. * * *"

The court held that the death of the testator came within the condition stated in the letters as follows:

> "* * * The operation, however, did not relieve her from the fatal disease with which she was afflicted; she did not recover from it as a result of the operation, but died directly from it. This was the event or condition she had in mind, the happening of which was to make the letters effectual as her last will—a failure to recover from her disease under an operation, and her death from the disease notwithstanding it—a condition which the trial court found to have occurred, and which we are satisfied may not be disturbed."

Thus the language of the letters in this *Cook case* is identical in meaning and legal effect with that in the letter propounded in the case at bar, and that the above opinion is perfectly in point is obvious.

In *Oetjen* v. *Diemmer,* 42 S.E.(Ga.) 388, the question was as to whether the will was contingent upon the happening of the events named therein, and the court held the will to be so contingent and not entitled to probate. In the opinion the courts states:

> "* * * The will, in so far as at present material, was as follows: '(5) If my wife and myself should perish at sea in going to or returning from Germany, I give, devise, and bequeath to my nephew William Henry Oetjen (son of my brother, Joseph), and his

heirs, forever, my house and lot (describing it) in the city of Augusta, Georgia.' etc.' '(7) Should my wife survive me, I devise and bequeath to her, during her natural life, the house and lot mentioned in the preceding 5th item of this, my will, and at her death it is my will that said house and lot shall vest in my nephew William Henry Oetjen, if living, and, if not, in his children,* * *' etc., 'This will was executed in 1878. Neither the testator nor his wife perished at sea. The wife died on or about January 21, 1899, while the testator lived until January 27, 1900. * * *'

"* * * As the contingencies did not occur, these items are inoperative. As to what the testator desired in case of the failure of these contingencies the will is silent, and we are left to conjecture alone, unless the testator's silence be evidence that he desired the law to take its course as in case of an intestacy. After a careful study of the will as a whole, we are convinced that the decision below was correct, and that the disputed items were all dependent upon the contingencies expressed in them, and that all of these items failed because of the failure of the contingencies."

In *Maxwell* v. *Maxwell* (1860) 3 Met. (Ky.) 101, it appeared that one had escaped from a steamboat wreck on the Mississippi river, on reaching land, immediately wrote a letter to his wife, detailing the hardships undergone and using, near the end, the following words: "The ice is still running very bad in the river. I can't say when I will be able to get off from here, but I hope soon, as the weather seems to be moderating. The river is very low, and navigation is very dangerous. *If I never get back home, I leave you everything I have in this world.*" This letter was received by his wife, and the writer himself eventually arrived home, but was a short time later murdered by his slaves. The letter was offered by the wife for probate, but

was refused, the court holding that it constituted a contingent will, saying: "It seems to us that the conclusion is inevitable that Maxwell did not intend the writing before us to be his will, except in the event of his never getting back home. Whether it was eventually to take place as his will, or not, was made by him, in his own words, *to depend on the happening or not happening of that particular event.* Here was a contingency—a condition. The only question remaining is, did it happen? It did not. The result is that the paper never was the will of Maxwell." In commenting on *Massie* v. *Griffin* (1859) 2 Met. (Ky.) 364, the court said: "The writing in this case is unlike that which was established as the will of Massie, in the case of *Massie* v. *Griffin* (Ky.) *supra,* decided at the summer term, 1859, of this court. *In that case it was decided that the condition was limited to a single provision of the will, and was not applicable to the entire writing, and it was not therefore a contingent will.* But here that portion of the writing claimed to be a testamentary instrument is made in such terms as to render it totally dependent on a contingency whether it shall ever become a will. The contingency applies to the entire disposition. The two cases are, therefore, not analogous."

Walker v. *Hibbard,* 215 S.W. (Ky.) 800, is a leading case cited in many decisions and holds:

> "A will, so phrased as to clearly show that it was intended to take effect only on the happening of the particular event set forth as the reason for writing it, is contingent."

The purported letter in the material part states:

> " '* * * I do not anticipate any trouble, but no one never knows. If anything should happen to me, I want you to please to do this for me. See that everything I have in the world goes to George B. Gomersall. * * *' "

As stated in the opinion the probation of the letters was contested on the ground:

> "* * * that the paper was a contingent will, and void as a final testamentary disposition because the contingency upon which it was to become effective never happened.
>
> "It is upon this last-named ground that the paper was rejected, and its probate refused by the circuit judge, who heard and disposed of the case.
>
> "It is conceded that Mrs. Long completely recovered from the operation to which she was about to submit when the paper was written, and died six months later from cause entirely independent of and having no connection with the operation itself or the ailment to relieve which it was performed. * * *"

In the opinion many cases are examined and differentiated including *Massie* v. *Griffin,* 2 Metc. (Ky.) 364; *Maxwell* v. *Maxwell,* 3 Metc. (Ky.) 101; *Bradford* v. *Bradford,* 4 Ky. Law, 947; *Forquer's Estate,* 216 Pa. 331, 66 Atl. 92; *Eaton* v. *Brown,* 193 U.S. 411, 24 S.Ct. 487, 48 L. ed. 730; *Kelleher* v. *Kernan,* 60 Md. 440; *Skipwith* v. *Cabell,* 19 Grat. (Va.) 758; *Redhead* v. *Readhead,* 83 Miss. 141, 35 So. 761; *French* v. *French,* 14 W. Va. 458; *Cody* v. *Conly,* 27 Grat. (Va.) 313; *Dougherty* v. *Dougherty,* 4th Metc. Ky. 25; *Morrow's Appeal,* 116 Pa. 440, 9 Atl. 660, *Dougherty* v. *Holscheider,* 40 Tex. Civ. App.

31, 88 S.W. 1113; *Magee* v. *McNeil,* 41 Miss. 17; *Hamilton's Estate,* 74 Pa. 69, and the Principles and Rules 1 to 3 stated on Pages 24-25, *supra,* are stated, exhaustively discussed and approved.

The court then reasons and holds:

> "Looking now again to the paper in the light of the authorities referred and the principles announced by which we are to be guided in ascertaining the class in which it should be put, we are convinced by the paper itself, without the aid of extrinsic evidence, that if a person not versed in the law of wills can write a contingent will Mrs. Long intended in writing this letter that it should have no effect if she survived the operation she was about to submit to, and was only written to provide against the fatality that might follow it.
>
> "If she had said in the letter, 'I only intend this disposition of my estate to be effective in the event I do not survive the operation I am about to submit to,' it would not manifest her purpose in writing it more clearly than the words she employed."

In *Lee* v. *Kirby,* 217 S.W. (Ky.) Page 895, the court held:

> "Where an instrument is a contingent will and the condition upon which it was to become effective has failed, it cannot be admitted to probate."

In discussing the holding the court cites with approval *Walker* v. *Hibbard, supra,* as follows:

> "This court but recently, in the case of *Walker, Adm'r,* v. *Hibbard,* 185 Ky. 795, 215 S.W. 800, after a careful consideration of the authorities, laid down the rules for testing a will to determine whether it is conditional or permanent. * * *"

In the recent case of *Ellison* v. *Smuts,* 151 S.W. (2d) (Ky.) 1017, the rules of construction and classification of

testamentary instruments as being contingent, or otherwise, as hereinabove stated are approved.

In *Watkins et al.* v. *Watkins' Adm'r.*, 269 Ky. 246, 106 S.W.(2d) 975, relied upon by appellee the will propounded contained the following opening statement:

> " 'Lexington, Kentucky, July 2nd, 1926.
>
> " 'In view of my trip to Kansas City, Missouri, for a short visit, I am leaving this memo Will in case of my passing away for any reason. * * *"

The testator died on December 1, 1929, some three years after his return from said trip. The court in the opinion states:

> "It is the contention of counsel for appellees that the first sentence of the instrument does not render the will conditional or contingent, but that testator was merely narrating an approaching event as an inducement for the making of the will. One of the leading cases bearing on conditional or contingent wills which has been widely cited and quoted is *Walker et al.* v. *Hibbard,* 185 Ky. 795, 215 S.W. 800, 805, 11 A.L.R. 832. * * *"

After citing and quoting with approval from the opinions in the *Dougherty* v. *Dougherty,* 61 Ky. 25, and *Walker et al.* v. *Hibbard,* 185 Ky. 795, 215 S.W. 800, the court states and holds:

> "* * * In the *Dougherty case* it is clearly manifest that testator had in mind and was making provision against death that might occur as a result of the specific thing assigned as a reason for making the will; and in *Walker* v. *Hibbard,* the approaching operation was recited as the inducement for making a will, and it was clearly providing against death that might occur as a result of the operation at the hospital. But in the

> instrument under consideration, the expression *'in case of my passing away for any reason' apparently does not refer solely to death during or as a possible result of the trip to Kansas City, but is general in its nature and brings the case within the general rule referred to in Walker* v. *Hibbard that where the reasons assigned for writing the will are general in their nature and it does not clearly appear that it was intended to be operative only during a certain period or until a certain emergency had passed, the will is permanent and not contingent.* * * *"

It is obvious that this case holds directly against the contention of the appellee that this "if" contingent letter in the case at bar is not a contingent will. The opinion specifically approves the principles and rules of construction and classification, presented above, under which such "if" wills must be held to be contingent, but holds that a will which states that same shall be operative *"in case of my passing away for any reason,"* is not made contingent on any specific occurrence or event as in the letter in the case at bar. It will be observed that all the cases relied upon by the appellee, and same are herein presented, do not present testamentary instruments which are specifically made so contingent.

In *Damon* v. *Damon* (1864) 8 Allen (Mass.) 192, it appeared that a will made in contemplation of a voyage commenced as follows:

> "I, J. W. Damon of Charlestown, in the county of Middlesex, commonwealth of Massachusetts, being in sound mind and body, and being about to go to Cuba, and knowing the dangers of voyages, do hereby make this as my last will and testament, in manner and form following: First, *If by casualty or otherwise I should*

> *lose my life during this voyage, I give and bequeath to my wife Ann,"* etc.

In the second and third clauses, the testator devised certain property to his nephews. The testator made the voyage, returned safely, and later died at home. The court held that the will was contingent as to the first clause, but should be admitted to probate as to the remainder.

In *Robnett* v. *Ashlock* (1872), 49 Mo. 171, the testator prefaced his will by the following words:

> *'I this day start to Kentucky; I may never get back, if it should be my misfortune, I give my property to my sisters' children,'* etc. The court held that the words referred to imported a condition on the fulfillment of which the will was to become operative, and that when the testator returned alive from Kentucky the will was void and inoperative, saying: 'The paper under consideration is awkwardly drawn, but its purport seems to be clear. Had the language been, 'I this day start for Kentucky; I may never come back; I therefore give,' etc., the language would only express the occasion of making the will, and the bequest would be absolute. Or if, after expressing the doubt about his return, he had said, 'Lest I should not return,' or words to that effect, 'I give,' etc., he might in that case be considered as merely expressing his sense of propriety of making a will, without intending to make the disposition of his property contingent upon his not returning. I take the words after the first phrase to mean, *'If it should be my misfortune never to get back,'* or *'If I die during my absence, I give,' etc. It is not easy to attach any other meaning to them, and with that meaning the bequest is made conditional upon his not returning, and could only become operative upon the contingency of his dying before his return.'*

In *Davis* v. *Davis,* 65 So. (Miss.) 241, the letter propounded contained the statement:

> "Should I not get over this operation, I want you and Papa to take charge of everything i've got, sell my pool room for about $500.00 at least, and I have $800.00 in the M. & F. Bank of Amory, and a Frisco check of $75.00 due on the 15th, and you know what I have in Columbus. My B. R. T. money is now delinquent and you cannot get that, but I have nearly got it straightened up again. * * *"

In the opinion it is stated:

> "That said Henry J. Davis recovered from his operation and returned to work as an employee of said railroad company, and, while in the employ of said company and engaged in his duties, he was killed by a train of said railroad company; his death being alleged to be due to the negligence and carelessness of the servants of said railroad company. * * *"

The court held:

> "* * * that deceased did not intend to make an unconditional bequest of his property, but only a bequest to take effect if he should not recover from the operation.
>
> "Construed in the light of these facts, it is clear that he did not intend to make an unconditional bequest of his property, but one to take effect only in the event he 'should * * * not get over' the operation he was then about to undergo. * * *"

In re: Young's Estate, 95 Okla. 205, 219 Pac. 100, it was held that a letter which stated "if I should die first, I want you and your heir to have what I have left" presented for probate was a holographic will. The trial court probated said letter as such. The addressee of the letter died before its author, but the heir of the addressee survived the author. On appeal the Supreme Court of Okla-

homa held that the letter should have been held not to be a will and probate refused, and further held:

> "We think the instrument must be denied probate for a further reason, even though it was intended as a testamentary disposition of her estate. If a will at all, it is a conditional will, and if the event upon which it is conditioned does not transpire, the will fails. *Dougherty* v. *Holscheider*, 40 Tex. Civ. 31, 88 S.W. 1113; *Du Dauzay* v. *Du Sauzay*, 105 Miss. 839, 63 S. 273; *In re*: *Whitaker*, 219 Pa. 646, 69 Atl. 89; *Walker* v. *Hibbard*, 185 Ky. 795, 215 S.W. 800, 11 A.L.R. 832; *Dougherty* v. *Dougherty*, 4 Metc. (Ky.) 25; *Robnett* v. *Ashlock*, 49 Mo. 171 * * * (101 219 P)."

The writer of the brief has diligently searched the decisions of American and English Appellate Courts, reference and textbooks, and the above are the leading cases in point in the case at bar, and no case or authority has been found holding that where the word "if" is used in a testamentary instrument, as in the case at bar, to state a specific condition or event as a condition precedent to the operation of the instrument, the instrument is not contingent, and should probated. It is believed that no such case or authority exists.

AUTHORITIES RELIED UPON BY APPELLEE

Cases relied upon by counsel for the appellee, some of which have been hereinabove presented in this brief, and the remainder are hereinafter presented, are not in point in the case at bar in that in said cases the pertinent language of the testamentary instruments involved did not specific-

ally introduce the arising or occurrence of a specific condition or event as a condition precedent to the operation of the instrument as a will, as did the letter presented in the case at bar, and in each of the cases relied upon by appellee, the court approves the principles and rules hereinabove presented, but points out the fact that the wills involved were not conditioned upon a specific condition or event, and differentiates the cases being decided from cases based upon instruments which express specific contingencies.

In the cases of *Watkins* v. *Watkins, Adm.*, 106 S.W. (2d) Ky. 975, (Pp. 47-48, *supra*); *In re: Forquer's Estate*, 66 Atl. (Pa.) 92, (Pp. 27-33, *supra*); *Ferguson* v. *Ferguson*, 44 S.W. (2d) Tex. 1096, (Pp. 28-30, supra), relied upon by the appellee are presented, *supra*, in this brief on the pages stated. The remaining cases relied upon by appellee are as follows:

In *Eaton* v. *Brown*, 193 U.S. 411, 24 S.Ct. 487, 48 L. ed. 730, relied upon by proponent, *the instrument presented for probate was in form and substance a general will and not in the form of a letter*, and the death of the testator occurred within four months after its execution, without change in the residence or family status of the testator. The will in its entirety read:

"Washington, D.C. Aug. 31"/001.

> "I am going on a Journey and may, not ever return. * * * All I have is my *one* hard earnings and and I propose to leave it to *whome* I please."

Considering the fact that this instrument was a *will* and not a *letter* written to meet a *current crisis,* specifically stated sudden, and that the will closed with the statement "All I have is my *one* hard earnings and I propose to leave it to *whome* I please," which clearly, as the court states, disclosed the intention of the testator that the bequests therein were not temporary or contingent, the court reasoned as follows:

> **"* * This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property; not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty—an hypothesis which is to the last degree improbable in the absence of explanation—it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which, on the face of it, has reference to an unconditioned gift."**

The court then cites with approval many of the cases presented above holding "if" wills to be contingent when same refer to a specifically stated condition, event or state of facts, as a contingency, and in differentiating the holdings in said cases the court in the opinion pointed out that the classification was different where the language used more clearly reflected the contingent nature of the instrument.

In holding the said Will proveable the Court stated:

> "* * * The only question, therefore, is whether the instrument is void because of the return of the deceased from her contemplated journey. *As to this, it cannot be disputed that grammatically and literally the words 'if I do not' (return) are the condition of*

> *the whole 'last request.'* There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention, to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of opinion that the will should be admitted to proof."

It thus appears that the opinion in this *Eaton case* approves the rule that testamentary instruments which introduce a specific condition or event as a condition precedent to their operation, are contingent, but held that the language of the will involved in the case did not make the operation of the will contingent on the happening of a specific event, and contained the quoted statement which evidenced the fact that the will was intended to be general and not contingent, and for those reasons was not contingent. It is clearly apparent that this *Eaton case* is against the contention of appellee that the letter in the case at bar should be probated, since the pertinent language in said letter is "in case I die if they do operate I bequeath you my belongings," etc., which is a specific statement of the events which are clearly made contingent upon the operation of the gift in the letter.

In re: Tinsley's Will, 174 N.W. (Iowa) 4, relied upon by appellee, the propounded instrument was a duly

executed will, the opening sentence of which in material part is as follows:

> " 'Des Moines, Ia., Sept. 2—15.
>
> " 'In case of any serious accident, after my just debts are paid, I direct that * * *' " An objection to the probation of the will was: "Said instrument, which is alleged to be a will, rests upon a contingency or the happening of an event, and refers to some future contingent event, which did not take place, and said instrument is therefore ineffective as a will."

The court held that the word "accident" meant death, and concluded and held as follows:

> "* * This position is taken on the strength of the introductory phrase of the instrument, 'In case of any serious accident,' etc. *From this expression, and from the fact appearing in evidence that the deceased was about to leave upon a trip to California, the court is asked to say that his intention in making the instrument was that it should become effective only in the event of his death while upon the contemplated trip, an event which concededly did not happen.* **In other words, counsel would have us construe the writing as if it read, 'I am about to make a trip to California, and if, by reason of any accident, I do not live to return to my home, then, and in that event, I dispose of my estate as follows,' etc. But to do this the court must make a will for the testator, expressing an intent which is not to be found in the writing which he executed.** * *
>
> *"In the case before us the fact that the deceased was about starting on a journey is not mentioned in the instrument, and the fact comes into the record only by the testimony of witnesses examined in the proceedings for its probate.* * * *
>
> "It may well be that the contemplation of a long journey, and its possible dangers and exposures, suggested to the mind of the deceased the wisdom of providing for the succession to his estate in the event of

> his death, and that acting upon this thought he prepared the paper in question. *This would indicate no more than that the circumstances mentioned were the occasion for his act, and not at all that his death while on that trip was a contingency without which the will would not become operative.*"

In this opinion the controlling principles and rules for the construction and classification of testamentary instruments, as to being contingent or general, hereinabove, presented, are stated and approved; however, they are held inapplicable for the reason *that the pertinent language used in the will only meant that in case of my death,* without stating a specific event. It is obvious that the will was not contingent on the death of the testator on a journey which was not referred to in the will.

Barber v. *Barber,* 13 N.E.(2d) Ill. 257, cited and relied upon by appellant herein, is against the contention that the letter herein involved should be probated and supports the above stated principles and rules under which its probate should be denied. The two letters involved in material part stated:

> " 'June 27, 1932
>
> " 'To whom it may concern:
>
> " 'I am leaving for New York State this morning, and if anything should happen to me I request that everything I own both personal and Real be given to my sister Miss May Barber. * * *
>
> " 'Decatur, Ill.,
> June 11, 1932.
>
> " 'To whom it may concern:

> " 'It is my desire to make a will in legal form and file away, but until I do I will expect this to be my will. * * *' "

The court held *that the language used did not even intimate that the bequest was contingent on the death of the testator on said trip and to the contrary one of the letters clearly states that until a will is prepared in legal form and filed away, said bequests should be in full force and effect.*

After approving the principles and rules presented in this brief, the court cites and discusses practically all the cases cited in this brief and held:

> "We hold that the will of Fred Barber is not conditional or contingent. *The introductory words, 'I am leaving for New York State this morning, and if anything should happen to me,'* merely state the occasion inducing the making of his will on the particular day it was executed. Testator did not qualify the quoted language by adding, 'on my journey to New York,' and we cannot, under the guise of construction, interpolate such words in order to infer a contingency and thereby frustrate a clearly expressed legal intention. The extrinsic evidence admitted on the application for probate confirms the unconditional character of the testamentary disposition and in no way even tends to vary or control the operation of the language employed in the will."

In *Merriman* v. *Schiel,* 140 N.E. (Ohio) 600, relied upon by the appellee, the holding in so far as applicable to the facts in the case at bar is against the probation of the letter presented here. The letter in this *Merriman case* in material part states:

> " 'I assert that I am in good health and of sound mind at the time of writing this testament * * *

> " 'This in case that I meet with accident on this journey these lots by Augus and George as atmistrer.' "

It is noted in the opinion that the testator specifically designated the instrument as "my last will," and that the concluding sentence relating to the journey was not of a dispositive nature and was not intended to effect the operation of the will. In holding the will not to be contingent the court reasoned and held:

> "* * * *The will takes effect at the time of the death of the testator, and some light may be thrown upon the testator's intent by inquiring whether the conditions and circumstances surrounding the testator were practically the same at the time of his death as at the time of the execution of the will. So far as this record discloses no change appears.* There is nothing in the will itself, nor are there additional facts in the record to indicate that an accident during the course of his journey to Montana, or within a reasonable time thereafter, would have had any reasonable or logical relation to his property or to the objects of his bounty * * * *The testator having retained the will in a safe place in his own home for more than a year after the danger of his journey had passed, without revoking the same, the courts should not lightly do after his death that which he had abundant opportunity to do in his lifetime."*

In the case at bar the letter propounded for probate was written approximately 13 years before the death of its author, and its operation was specifically conditioned "in case I die if they do operate, I bequeath," etc., and neither the operation or death occurred, and the letter was kept by the addressee and never mentioned or referred to by the author or the addressee, and during said period of 13 years after the letter was written the author engaged in business

in Alaska for 11 years and resided in Oklahoma for three years until his death July 8, 1944. While on the other hand in this *Merriman case,* as the court states in the opinion, the language used was not dispositive or contingent, it is clear that the opinion in this *Merriman case* has no application to an "if" testamentary instrument.

In re: Moore's Estate, 2 Atl.(2d) Pa. 761, relied upon by the appellee, does not support the contention that the will presented in the case at bar should be probated, and the holdings in the cases of *Morrow's Appeal,* 9 Atl. (Pa.) 660, Pp. 36-38, *supra,* and *Forquer's Estate,* 66 Atl. (Pa.) 92, Pp. 30-33, *supra,* are cited and approved. In the opinion in this Moore's *Estate case the court directs attention to the fact that the will is not contingent upon the occurrence of a specific event* and states:

> "* * * While the paper might have been less ambiguous if testatrix had punctuated it, we must deal with it as it appears in the record; *its ambiguity requires consideration of the circumstances in which it was written.* We think her reference to the proposed trip to Cincinnati was intended as an explanation why, at that time, she made her will, to be effective whenever she might die, unless, of course, she revoked it; *instead of revoking it, she retained it until her death twelve years later. Her conduct supports the inference that she did not wish to die intestate."*

In re: Langer's Estate, 281 N.Y.S. 866, relied upon by the appellee, is likewise not in point, *and the court holds that the will involved did not make a specific event the contingency upon which same would operate and approved the holding. In re: Poonarian's Will* (Pp. 39-40, *supra*), as follows:

*"Here the condition, if it can be called one at all, is not attached to the substance of the gift. The court is of opinion that the quoted language, no matter which translation is accepted, does not constitute a condition. It is merely a statement of the inducement which led to the writing of the instruments. There is not to be found in it the statement of a specific hazard or of a specific contingency such as was found In re: Poonarian's Will, 234 N.Y. 329, 137 N.E. 606, upon which contestants rely. * * *"*

It thus appears the cases relied upon by appellee in the District Court to support the contention that the letter involved in the case at bar should be probated did not present testamentary instruments, the operation of which was directly made contingent on the occurrence of a specifically stated event, *and, that in the opinions in said cited cases the rules presented on Pp. 24, et seq., supra, under which the letter presented in the case at bar must be held contingent, were approved.*

Where, as in the case at bar, the language of the testamentary instrument is plain and clear, both in its expression and in its meaning, the application of rules of construction is unnecessary.

McDonald v. *Cleremont*, 153 Atl. (N.J.) 601, and cases cited.

In re: Clark's Estate, 284 Pac. 231, 103 Cal. App. 243;

Citizens' & Southern Nat. Bank v. *Clark,* 158 S.E. 297, 172 Ga. 625;

Foss v. *State Bank & Trust Co.,* 175 N.E. 12, 343 Ill. 94, affirming *State Bank & Trust Co.* v. *Foss,* 257 Ill. App. 435;

Bireley's Adm'rs. v. *United Lutheran Church in America,* 39 S.W. (2d) 203, 239 Ky. 82;

Low v. *First Nat. Bank & Trust Co. of Vicksburg,* 138 S. 586, 162 Miss. 53, 80 A.L.R. 112;

White v. *Weed,* 175 A. 814, 87 N.H. 153;

In re: Blanch's Will, 214 N.Y.S. 565, 126 Misc. 421;

In re: Barrett's Estate, 253 N.Y.S. 658, 141 Misc. 637;

In re: Watson's Will, 258 N.Y.S. 755, 144 Misc. 213, modified 262 N.Y.S. 394, 237 App. Div. 625, modified 186 N.E. 787, 262 N.Y. 284;

Williams v. *Best,* 142 S.E. 2, 195 N.C. 324;

Fields v. *Fields,* 3 Pac. (2d) 771, 139 Or. 41, rehearing denied 7 Pac. (2d) 975, 139 Or. 41;

In re: Bumm's Estate, 159 A. 15, 306 Pa. 269;

Conner v. *Everhart,* 169 S.E. 857, 160 Va. 544;

In re: Weed's Will, 252 N.W. 294, 213 Wis. 574.

The rule of presumption against intestacy cannot be used to justify a revision of the clear language of a will, and the court, under the guise of construing a will, will not write a new will, and what the testator says in the instrument must control, and the court must not construe the language used to cause same to express what the testator did not intend.

The above is the substance of the syllabus in *Glover* v. *Reynolds,* 37 Atl. (N.J.) 90, and in the opinion the court reasoned and held:

"It is argued in the briefs that the intention of the decedent 'can be spelt out, and it logically appears to be: ' 'In the event that my husband die' ', or in other words, 'if my husband does not survive me, I give and bequeath,' etc. This argument is based on the premise that the testatrix did not intend to die intestate. The rule of presumption against intestacy, however, cannot be used to justify a revision of the clear language of the will. *Federal Trust* Co. v. *Ost.*, 120 N.J. Eq. 43, 183 A. 830, affirmed 121 N.J. Eq. 608, 191 A. 746.

"* * * In the case of *McDonald* v. *Clermont*, 107 N.J. Eq. 585, at Page 589, 153 A. 601, 603, the Court of Errors and Appeals adopted as its own view the following language of Vice Chancellor Buchanan: ' * * * he did not say it in his will, and this court cannot say it for him. It is regrettable, but after all it is the testator's own fault. The law throws all possible safeguards about the execution of a will, so a man may be sure that his property will go in accordance with what he provides in his will; but the law cannot—or at least does not—compel a man to have his will drawn by some one who knows how.' "

Of course, in the case at bar the author of the letter clearly and specifically stated what the will intended. The language of the letter is good clear English, and evidences the fact that the author was a man of considerable education and experience.

The following cases support the above proposition:

In re: Hoytema's Estate, 181 Pac. (Cal.) 645;
Toso v. *State Bank & Trust Co.*, 175 N.E. (Ill.) 12;
Verhalen v. *Klein*, 28 S.W. (Tex.) 975;
Jones v. *Brown*, 144 S.E. (Va.) 620;
First Nat. Bank v. *Shukan*, 126 S. 409.

CONCLUSION

Without burdening the Court and this brief with recapitulation of points herein presented. we conclude with the statements:

1. That the controlling question on this appeal is one purely of law and as to whether the operation of the letter, as a will, which was written in a Washington, D. C., hospital just before a planned operation on its author was contingent and not entitled to probation as a will, where same specifically states, "In case I die if they do operate I bequeath you my belongings and property," and the author does not undergo the planned operation and does not die, but recovers and returns to his home in Alaska, and resides and engages in business there for 10 years, and then returns to Oklahoma and dies in Oklahoma three years later, and some 13 years after the letter was written.

2. That the applicable and controlling rule is that where the language of a testamentary instrument clearly conditions its operation on the happening of a specifically stated event or condition, its operation is contingent and the instrument is inoperative where the event does not occur.

3. That where the pertinent language of testamentary instruments clearly and directly condition the operation of such instrument on the happening of a specifically stated condition or event, as in the letter in the case at bar, the authorities concur in holding such testamentary instruments to be contingent upon the occurrence or happening of the stated condition or event.

4. The decree of the District Court of Alaska setting aside and vacating the judgment of the Probate Court by refusing probate to the said letter and further ordering and directing that the said letter be probated as the will of J. M. Pearl, deceased, should be reversed and vacated, and the said District Court directed to affirm the judgment of the said probate court denying probate to the said letter.

Respectfully submitted,

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AUGUST, 1947

No. 11,553

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BYRON W. WOOD,	
	Appellant,
vs.	
PAUL GREIMANN,	
	Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This case originated from the Commissioner's Court, Fairbanks Precinct, Fourth Judicial Division, Alaska, which Court was sitting as a Court of Probate under the laws of Alaska.

Compiled Laws of Alaska, 1933, Sec. 4348, p. 847;

Lovskog v. American National Red Cross, 111 Fed. (2d) 88.

On March 6, 1945, at Fairbanks, Alaska, Appellee, Paul Greimann, was duly and regularly appointed as Administrator with Will Annexed of the Estate of J. M. Pearl, who died at Muskogee, Oklahoma, on July 8, 1944, while confined in a Veterans' Hospital. Pearl was then, and since 1923 had been, a resident

of the Fourth Judicial Division of Alaska, near Fairbanks, until his death.

The Appellant, Byron W. Wood, claiming to be a full brother of Pearl, resided at Council Hill, Oklahoma, and had never been in Alaska.

Appellant Wood filed an Amended Petition in said Probate Court on the day preceding the date set for the hearing on the Final Account of Greimann's administration of the estate of J. M. Pearl, deceased, claiming that the last will and testament theretofore admitted to probate in said Court was a contingent Will and not an absolute Will, asking for revocation of the Order admitting the Will to probate, removing Greimann as Administrator with the Will Annexed, objecting to the Final Account, and for relief in other respects, which are not here material (R. 10).

The said Probate Court, after due hearing upon Appellant's Amended Petition, held and decided that the Will was void, not being an absolute, but a contingent, Will, and therefore not entitled to probate, and denying said Amended Petition in all other respects (R. 35).

Thereupon Greimann, Appellee here, appealed from the Order of the Probate Court to the District Court of the Territory of Alaska, Fourth Judicial Division, as provided by the laws of Alaska (*Compiled Laws of Alaska, 1933,* Sec. 4571, p. 885).

Upon the appeal the District Court, by a Decree following a written opinion, reversed the Order and Judgment of the Probate Court and held that the

Will of Pearl was not contingent but absolute and was entitled to probate.

The Appellant, Byron W. Wood, now appeals to this Honorable Court to reverse the decree of the District Court of the Territory of Alaska, Fourth Division.

FACTS.

The deceased, J. M. Pearl, a veteran of the Spanish-American War, aged seventy-five years or over, died at Muskogee, Oklahoma, on July 8, 1944. He had gone there for medical attention and died in a Veterans' Hospital from paralysis with which he was stricken in the Summer of 1942. He had left Fairbanks at the suggestion of Greimann about November 1, 1941, he, Pearl, being then in ill health.

Pearl and Greimann came to Alaska from the State of Illinois in 1923. For three years prior they had lived and worked together in Illinois. In Fairbanks, Alaska, they opened a garage business as equal copartners under the name of Pearl & Pearl. This continued until sometime in 1930 when Pearl withdrew from the business and settled down in the real estate business about one and one-half miles from Fairbanks. He sold lots upon a tract of land of three hundred twenty acres, which Greimann had acquired for both, and which was equally divided at the time of their partnership dissolution. Greimann carried on the garage business, and does now.

Their acquaintance and friendship continued unbroken until the death of Pearl in 1944, which is somewhat unusual in a frontier country.

On September 26, 1931, Pearl was under treatment in a Veterans' Hospital in Washington, D. C., and he wrote a letter to Greimann, Appellee, addressing him as "Dear (Boy) Paul" and signing same as "Dad J. M. Pearl". This letter, and the envelope in which the same was mailed, is in the hardwriting of Pearl, and a copy thereof in full is found on pages 4 to 7 of the Transcript of Record under the heading "Appellant's Exhibit A".

The essential portion of this letter constituting the foundation of the claim and contention of Appellee is the paragraph at the bottom of page 5 and continuing to the top of page 6 of the Record, which reads as follows:

> "We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, and in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education. I would ask to be buried here in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly."

As shown by the Decree rendered by the District Court (R. 44-46), no evidence whatever was offered or introduced by the Appellant here, Byron W. Wood, showing, or tending to show, the truth of any of the

allegations contained in his Amended Petition filed in the Probate Court. On that point the Decree entered by the District Court (R. 44) recites as follows:

> "Appellant presented certain oral and documentary testimony and evidence and rested, and petitioner Byron W. Wood, as appellee, offered none."

PLEADINGS AND PROOF ON APPEAL TO DISTRICT COURT.

The proof, therefore, in the District Court rested solely upon the Will of Pearl and the testimony of Greimann. At the close of the case before the above named Court, the testimony of Greimann remained unchallenged and wholly uncontradicted. His testimony sustained all the allegations of the Answer filed by Greimann in the Probate Court, which is found on pages 29 to 33 inclusive of the Transcript of Record.

While no separate formal Findings of Fact or Conclusions were entered in the case in the District Court, the filed Opinion of that Court alludes to and decides all the essential facts necessary upon which the Court's decision is based.

In the opinion of the learned Trial Court, the main issue passed upon was the validity or invalidity of the Will of Pearl as contained in the letter of Pearl to Greimann dated September 27, 1931, from Washington, D. C. On that question the District Court ruled against the contention of Petitioner Wood and ordered that the Will be admitted to probate as the Last Will and Testament of Pearl.

ARGUMENT.

In the Brief for Appellant (p. 22) under the heading "Points and Authorities" etc., referring to the contents of the letter from Pearl to Greimann dated September 26, 1931, from the Washington, D. C., hospital, it is stated:

> "* * * said letter specifically detailed Pearl's afflictions and treatment *and advised that an operation was impending,* and with regard to the said crisis said Pearl wrote said Greimann: 'in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education. I would ask to be buried in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of Oct. or soon after as they are going right after my case properly'; that said bequests and requests were contingent and conditioned upon the death of the said Pearl resulting from *said impending operation;* * * *."

It is also, on page 22 of said Brief, in the last four lines of the first paragraph, stated:

> "The urge for writing the letter *was the impending operation* and the language used specifically expressed conditions precedent to its operation. These conditions or events did not occur and the letter never became effective as a will."

Thereafter in the Brief reference is made in the same way to some supposed "impending operation" or "immediate operation" or "planned immediate operation".

The record as a whole and the letter as a whole makes no mention of any kind of operation being planned, impending, or immediate when Pearl penned said letter, nor did Pearl in said letter advise Greimann that his doctors had ever suggested the possibility of an operation. If his physicians had done so, Pearl would undoubtedly have commented on it in detail to Greimann.

It would appear to a reasonable mind that the words "in case I die" were suggested by the fact that Pearl had recently been asked by the hospital authorities "to give reference as nearest of kin to be notified in case of death". Those words are commonplace and express no contingency. It would also appear that the words "if they do operate" were words that flashed into his mind as he wrote and have no special significance. It is apparent that Pearl, as he wrote, suddenly thought of an operation and stated that, on the spur of the moment as the only factor which might cause his death.

His reason for the use of these words "in case I die if they do operate" was to indicate the inducement or circumstances of self-justification for then making a testamentary disposition of his property and were in no sense used by him to express a condition or contingency. They are mere words of inducement aroused by the suggestion of death, and in no sense express a condition or contingency.

> "We have to give reference as nearest of kin to be notified in case of death. I gave you my boy * * *."

Death was the foremost idea in his mind, and it was not "death" limited and circumscribed by the idea of death merely from an operation, which had never been hinted at by anybody or recommended, so far as the record shows.

Later on he says, "I do not expect to die", without confining this expression to the idea of death from an operation. He believed he would not die from any cause whatsoever but would be on his "way home by the 20th of Oct."

We base our case upon the foregoing analysis of the language used. And, in this connection, we wish to forcibly point out to this Court that, although on page 20 of Appellant's Brief, in the last two lines, it is stated:

> " * * * it is obvious that a thorough and careful study and analysis of said language of the letter ranks first."

The Brief fails to disclose any attempt to study or to analyze the language of the letter in question.

In the first paragraph on page 21 of Appellant's Brief, it is stated, mistakenly perhaps, that:

> "The letter set forth at length * * * *the necessity for the performance of the operation,* * * *."

On the contrary, the letter referred to states nothing whatever about that subject. There was no such necessity mentioned in the letter whatever, and the only conclusion that can be justly arrived at is that such a statement is intended to mislead.

This affront to the Court's intelligence might be overlooked in a single instance were it not for the fact that in Appellant's Brief the supposed "operation" referred to is described variously as "impending", "immediate", "planned" (pages 19, 20, 21, 22, 23).

Not a word in the record or in the letter which is the subject of interpretation and construction justifies or warrants such description and the so-called "operation" is a complete myth so far as the record shows.

While on this subject, I may be permitted to call the Court's attention to other instances of this nature.

In said first paragraph on page 21, line 5, of Appellant's Brief, the writer says the letter was written "at the time an operation was planned and impending", and, on page 20, line 8, it is stated that the bequest was conditional upon Pearl's death "resulting from the said impending operation".

On page 19, second line from bottom, it is said "an immediate operation on said Pearl was planned".

On page 22, "advised that an operation was impending".

On page 23, line 6, "resulting from said impending operation", and twice more on said page, lines 4 and 2 from the bottom, "the impending operation" and "said planned immediate operation".

And again on page 63, lines 8 and 12, it is said "just before a planned operation on its author" and "and the author does not undergo the planned operation".

These absurd repetitions convince that it is not desired by the Brief of Appellant to adhere to the undisputed facts and that it attempts to convey a wholly different and entirely wrong impression from the facts in evidence.

Reiteration, continuous, of an erroneous statement seldom compels acceptance.

Pearl did "not expect to die". He merely used the words "if they do operate" to indicate that he believed in case he died his death might result from some operation if one were performed, but not otherwise.

The tone and language of the letter as a whole displays the genial and talkative nature of Pearl and that he was enjoying the role of benefactor to his "dear (Boy) Paul" whom he regarded as his "nearest of kin".

Pearl allowed this Will to stand for thirteen years and until his death, and why should the Court do now what he failed to do in his lifetime?

AUTHORITIES.

In his work "The American Law of Administration", Third Edition, Woerner, at pages 70 and 71, speaking of conditional and contingent Wills, adds:

> "The conditional or contingent character must appear from the Will itself, not from extrinsic evidence. In such case it is important to ascertain, first, whether the intention of the testator is to make the validity of the Will dependent upon

the condition, or merely to state the circumstances inducing him to make the testamentary provision. * * *"

The author then refers to the case of *French v. French,* 14 W. Va. 458 (to which case we do not have access), and continues as follows:

"The case of French v. French presents some instructive features on this question, and may with profit be noticed *in extenso.* The will was a holograph, in the following form: 'Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real, to my beloved wife, Florence. Witness my hand and seal, 7th of March, 1872. Wm. T. French.' It was proved, on the propounding of the will, that French was about to cross a deep river; that his wife, being afraid that some accident would happen, was anxious that he should not go; that decedent started out of the room, and then came back and wrote the will. * * * It also appeared in the cause * * * that he was not drowned on the day of writing the will, but died on the 29th of December, 1874 * * *. Upon these facts the majority of the court, after an extensive review of English and American authorities bearing upon the question of contingent wills, reached the conclusion that 'it was the intention and purpose of the decedent that said paper writing should be his unconditional will and testament, giving to his wife Florence all of his real and personal estate at his death, whether natural or otherwise * * *.' * * * The president of the court dissented, holding it to be self-evident that the words of the will, '*if* I get drowned', etc., could not possibly mean '*as I may* get drowned', etc.

Four of the five judges concurred in the majority opinion, rendered by Haymon, Jr. *This inclination of the courts not to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, although his language if strictly construed would express a condition,* is forcibly illustrated in the recent case of Eaton v. Brown, where the U. S. Supreme Court unanimously held an instrument, written by one not highly educated, to be an absolute and not a conditional will, which was couched in the following language: 'I am going on a Journey & may, not ever return. And if I do not, this is my last request.' The Court laid some stress on the permanent nature of the bequest contained in it. Although the testator safely returned from the contemplated journey the court upheld the will."

We consider this expression of this renowned author sustains our contention fully.

In the case of *Eaton v. Brown,* 193 U. S. 411, the late Mr. Justice Holmes wrote the opinion, unanimously approved, and sustained the writing in that case as a permanent and absolute Will. The Court further held that "the primary import of isolated words may be held to be modified and controlled by the *dominant intention* to be gathered from the instrument as a whole."

We find a long list of cases in which this decision of the United States Supreme Court in the case of *Eaton v. Brown,* supra, has been referred to, and we desire to call attention particularly to the case of *In*

re Boutelle's Estate, 15 N. W. (2d) 506, in which the Supreme Court of Minnesota, in 1944, states as follows (bottom of page 509):

> "One of the highest duties resting upon a Court is to carry out the intentions of a testator expressed in valid provisions not repugnant to well settled principles of public policy. * * * What is sought is not the meaning of the words alone, or the meaning of the writer alone, but the meaning of the words as used by the writer. * * * It is the *dominant intention* to be gathered from the instrument as a whole, not isolated words, that should guide us. And we are required to place a reasonable and sensible construction upon the language used. Hence canons of construction are only aids for ascertaining testamentary intent which are to be followed only so far as they accomplish that end."

It must be noted that, in the case of *Eaton v. Brown,* supra, the late Mr. Justice Holmes, speaking for the Court, states:

> "The latest English decisions which we have seen qualify the tendency of some of the earlier ones."

and he cites a number of cases which he states strongly favor the view which we adopt, among which cases is *French v. French,* 14 W. Va. 458 (502), which is pointed out in the quotation above given from Woerner's "The American Law of Administration," 3rd Ed., Vol. 1, page 70.

In the case of *Barber v. Barber* (Ill.), 13 N. E. (2d) 257, syllabus 9 reads:

> "If the language used in a Will can reasonably be construed to mean that the testator refers to a possible danger or threatened calamity only as a reason for making a Will at the time rather than as a condition precedent to the Will becoming operative, such construction should prevail and the Will be construed as not 'conditional' ".

If the Appellant finds any comfort in these judicial pronouncements, we confess to an inability to understand simple and clear language.

From the language of the letter here in question, no other conclusion can be reached than that the "dominant intention" of the writer, Pearl, was to make a permanent and absolute disposition of all his belongings and property to his "nearest of kin," unhampered by any strings except for the bequest of $100.00 to young Gallagher to aid him in his education.

Page on "Wills", Lifetime Edition, Vol. 1, Sec. 96, pages 209-210, announces the following principle:

> "There is quite a strong tendency to treat such provisions, where possible, as descriptive of the motives which induced testator to make his Will and not as conditions upon which the validity of the Will depends. Such a Will is sometimes called a 'permanent' Will."

We respectfully call this Court's attention to our law on the subject of determining the testator's intention, as follows:

> "Sec. 4639. Construction of Wills: Testator's Intention to Be Carried Out. All Courts and

> others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them." (Compiled Laws of Alaska, 1933, at page 892).

The Trial Court, in its opinion, supports its decision in part by citing *In re Tinsley's Will,* 174 N. W. 4. The Brief of Appellant generously concedes what is therein claimed to be "obvious" but contends that the Tinsley decision has, nevertheless, no application in this controversy. Our minds fail to grasp this contention but we assert with confidence that this Court will appreciate its significance in determining what is meant by the language used by Pearl taken in connection with all the circumstances existing at the time of writing, as disclosed by the document itself.

In the case of *Barber v. Barber,* supra, we find Appellant's Brief claiming that the Court in that case upholds his contention throughout and is against the claims of Appellee. We must suggest that the Trial Court, whose decree is now sought by Appellant to be set aside and annulled, should be extended some credit for intelligence and judgment, otherwise that court would not have rested its decision upholding the Will of Pearl partly upon the strength of *Barber v. Barber.*

Appellant's Brief makes a similar claim as to the cases of *Watkins et al. v. Watkins Admr.,* 106 S. W. (2d) 975; also *In re Forquer's Estate,* 66 Atl. 92; also *Ferguson v. Ferguson,* 45 S. W. (2d) 1096.

In the *Ferguson* case last mentioned, the Court states:

> "To hold a Will contingent, it must reasonably appear that the testator affirmatively intended the Will not to take effect unless the given contingency did or did not happen, as the case might be."

The only other case not criticized adversely or explained away as authority against Appellee and in favor of Appellant is: In *Succession of Gurganus,* decided in 1944, 20 So. (2d) 296, holding that the Will in question there was not contingent. That Will, made in 1924, endured until the death of testator in 1943. Undoubtedly Appellant overlooked this *Gurganus* case purposely. It flatly contradicts and overthrows his contentions in this case.

The Court in deciding this *Gurganus* case referred to the fact:

> "* * * the testatrix never revoked the Will during the long period of years elapsing between its writing and her death. This is an additional reason why the Will was never intended to be conditional. We are supported in our views by the cases of National Bank of Commerce of Charleston vs. Wehrle, 124 W. Va. 268, 20 S. E. (2) 112; Lafayette V. Eaton vs. Harrison H. Brown, 193 U. S. 411, 24 S. Ct. 487, 48 L. Ed. 730; and Watkins vs. Watkins Admr., 269 Ky. 246, 106 S. W. (2) 975, and authorities therein cited."

We have now mentioned or adverted to the majority of the cases cited in the decree rendered herein

by the Trial Court as shown by the written Opinion filed by the Trial Judge on October 14, 1946, except the case of *McMerriman v. Schiel et al.* (Ohio), 140 N. E. 600. Speaking from this later case, the Trial Court quotes as follows from the Ohio Court's opinion:

> "* * * In the absence of any declaration in the former decisions of this court, and in view of the irreconcilable conflict among the decisions of other states, and among the English cases, we are disposed to accept as entitled to most value the declarations of the Supreme Court of the United States. * * *"

We submit that the Trial Court in the case at bar could not have been mistaken in its interpretation with reference to the proper meaning of the authorities relied upon to sustain its decree.

Appellant's Brief bristles with authorities but nowhere does it appear therefrom that the case of *Eaton v. Brown,* supra, decided by the Supreme Court of the United States, has been modified or overruled. On the other hand, the opinion written by the late Mr. Justice Holmes has been quoted, cited, and followed by every Court dealing with this subject.

A late case which arose in Pennsylvania, namely, *In re Kayser's Estate,* 38 Berks 205 (Pa. Orph.), to which reports we have no access, recites that the Will made by the testator began as follows:

> "September 15 '45. In case something should happen to me before I have a chance to see Mr. Trexler, this is my last will & testament. * * *"

One of the questions before the Court required the Court to decide whether the will was contingent or not. The evidence showed that after the writing of the will, decedent had been in conference with Mr. Trexler, who was her attorney. The Court held that the will was non-contingent.

Our position in this case rests upon *Eaton v. Brown,* supra, and all the supporting authorities since that opinion was written, and we can not depart from its ruling that the "dominant intention" of the testator must be ascertained from the whole instrument, and given proper effect by the courts.

Another case not hereinbefore cited which strongly supports the position of Appellee is *In re Moore's Estate,* 2 Atl. (2d) 761.

APPELLANT WOOD WAS NOT ENTITLED TO INVOKE AID OF PROBATE COURT.

In the Probate Court, Appellee filed a motion to dismiss the Amended Petition of the Appellant here (R. 19), and also filed a Demurrer on similar grounds (R. 22). We raised the question, adversely decided by the Probate Court, that the petitioner, Wood, had no standing in the Probate Court, as shown by his Amended Petition. He was not an heir, legatee, devisee, creditor, or other person interested in the estate, as the law requires.

As we have heretofore pointed out in our Statement of Facts, Appellant filed his Amended Petition in the Probate Court on the day preceding the day appointed

for the hearing upon the Final Account of Greimann as Administrator with Will Annexed of Pearl's Estate and his Petition for distribution of said estate. Appellant used Greimann's Petition for approval of his final account and for distribution of said estate as a guise for contesting the validity of Pearl's Will and as a lever for getting into Court. In no view can Appellant Wood claim authority for this procedure as our law specifically provides who may file objections to a final account of an Administrator, the section of our statute being as follows:

> "Sec. 4467. Objections to final account, by whom and when made. An heir, creditor, or other person interested in the estate, may, on or before the day appointed for such hearing and settlement, file his objections thereto, or to any particular item thereof, specifying the particulars of such objections; * * *." (Compiled Laws of Alaska, 1933, p. 868).

Appellant also asked the Court to remove Greimann as Administrator. He was not entitled to ask for such relief, the section of our statute on this subject being as follows:

> "Sec. 4371. Heir may apply for removal of executor or administrator. Any heir, legatee, devisee, creditor, or other person interested in the estate may apply for the removal of an executor or administrator * * *." (Compiled Laws of Alaska, 1933, p. 852).

If, as stated in Appellant's Amended Petition, Pearl was survived by a wife, she, in the event Pearl had died intestate, would have been his sole heir, and

Wood could not qualify as a person having any interest in the estate as required by law. Secs. 4651 and 4652, Compiled Laws of Alaska, 1933, pp. 893, 894.

The Trial Court ignored this question of jurisdiction in his Opinion and decided the case on its merits, disregarding technicalities in pleadings. If we have now a right to do so, we direct the attention of this Court to that question. We believe we have such right as it raises the question of jurisdiction. The petitioner Wood had no standing in law to interrupt the orderly course of proceedings in the Probate Court. We insist that Appellant Wood, by his own assertions that Pearl was married at the time of death (although no evidence on this subject was produced before the Trial Court, and no such person has ever asserted any right in this proceeding), placed himself outside the classes of persons authorized by law to object to the Final Account of Greimann as Administrator, or to claim any portion of Pearl's estate, or to contest the validity of Pearl's Will, or to seek the relief prayed for in his Amended Petition.

We therefore insist that, having no authority to institute this suit in the Probate Court in the first place, he is a mere interloper and has no authority now to maintain such suit or this appeal.

NO BILL OF EXCEPTIONS.

Furthermore, the transcript in this case is so irregular, confusing, incorrect, and incomplete as to justify

a motion to strike the same from the record, but we have refrained from such course of action lest we deceive ourselves by so doing.

Appellant has carried on this appeal in an *ex parte* manner and has failed to serve on Appellee's Attorney of record any of the essential appeal papers, except the Notice of Appeal (R. 46-48).

Appellant has further failed to secure the signature of the Trial Judge to the proposed Bill of Exceptions within the time allowed by law or any valid extension, all in gross violation of law and the Rules of the Trial Court and of this Court.

On the question of rules to be observed regarding time of settling and filing Bills of Exception, we cite the following:

Buckley v. Verhonic, 82 Fed. (2d) 730;
McDonald v. Harding, 57 Fed. (2d) 119;
Walton v. Southern Pac. Co., 53 Fed. (2d) 63-68;
Dalton v. Hazelett, 182 Fed. 561;
Dalton v. Gunnison, 165 Fed. 873-876;
National Veneer Co. v. Langley, 29 Fed. (2d) 403;
O'Brien's Manual, p. 146.

Whatever action, if any, this Court may take in view of the two subjects last referred to its attention, as stated by the Court in the *Walton* case above mentioned, the Appellant can not complain as he is the "author of his own misfortune."

CONCLUSION.

We again refer to the following aspects of this last will and testament of Pearl in favor of its acceptance and its validity, apparent on its face:

(a) He was acting under apprehension of death generated by the requests made of him by the hospital authorities.

(b) Greimann, the main recipient of his bounty, was regarded as his "nearest of kin."

(c) He, Pearl, was not afraid that he would die, his words being: "I do not expect to die", without suggesting any cause whatever and thereby implying death resulting from all causes.

(d) Greimann was Pearl's solid friend of years' standing and for whom and his "babes" Pearl had strong, unwavering affection.

(e) Pearl had thirteen years to reconsider his action and did not revoke, during that period, nor did he intimate or suggest in his Will that it was merely to be temporary and not permanent.

The law does not favor intestacy and the general rule is that, as found stated in syllabus 3 of *In re Langer's Estate,* 281 N. Y. S. 866:

> "Courts do not incline to regard a will as conditional where it reasonably can be held that the testator was merely expressing his inducement to make it although the language, if strictly construed, would express a condition."

And, in syllabus 5 of the same case, it is further said:

> "General rule is that mere matters of inducement though phrased conditionally do not constitute a condition which requires the rejection of a will."

Finally, we respectfully refer this Honorable Court to the case of *National Bank of Commerce etc. v. Wehrle,* 20 S. E. (2d), 112 to 115, where the case of *French v. French,* supra, is referred to and quoted with approval.

We submit that the decree of the District Court of Alaska should be affirmed as the established law, that the appellant Wood has no standing in this Court, and that the Will of Pearl is an absolute and permanent Will and entitled to probate as such.

Dated, Fairbanks, Alaska,
November 14, 1947.

Respectfully submitted,
CECIL H. CLEGG,
Attorney for Appellee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,

VERSUS

PAUL GREIMANN,
Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT

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DECEMBER, 1947.

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IN THE
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REPLY BRIEF ON BEHALF OF APPELLANT

STATEMENT OF CASE, PLEADINGS AND FACTS

The statements of the case, facts, pleadings and proof on the part of the appellee, comprising Pages 1-5, inclusive of the Brief of Appellee, and the statements of the case, pleadings, facts, and proceedings had and orders and decrees made and entered herein comprising Pages 1-19, inclusive of the Brief on behalf of Appellant, present no issue and are substantially the same except the statements in Appellant's Brief are full and comprehensive.

No issue of fact and only one question of law involved on this appeal.

Under the heading "ARGUMENT," beginning on Page 6 and extending to and including Page 10 of Appellee's Brief, it is asserted that on Pages 19, 20, 21, 22, 23 and 63 of Appellant's Brief appear repeated statements that the letter presented for probate as the will of J. M. Pearl, deceased, states said Pearl's afflictions, the treatment therefor, the serious nature thereof, and a planned operation, which are untrue and unwarranted, and further charges that:

> "These absurd repetitions convince that it is not desired by the Brief of Appellant to adhere to the undisputed facts and that it attempts to convey a wholly different and entirely wrong impression from the facts in evidence."

In determining whether this complaint is well founded, upon the soundness of which, as counsel for appellee states on Page 8 of said brief: *"we base our case upon the foregoing analysis of the language used" in said letter,* it is only necessary to consider the pertinent language of the letter itself (See Tr. 4-6). The pertinent parts of said letter are as follows:

> "* * * I had supposed that I would be quite a ways on my homeward bound journey by this time but fate deals elusively at times and handles our courses and actions in a curious and extremely decisive manner at times. *I was discharged on Sept. 17th and expected to start home on the 18th but not having received the desired results at the Naval Hospital, Judge Wickersham and Dr. Cline head of the Veterans Bureau stopped the effect of my discharge and I was put in Mt. Alto*

*Hosp. * * * Well I am here and so much examining as I have gone thru has nearly worn me out. Last Thursday I had the worst spell from several stand-points that I have ever had. The headache, breast-ache, and stomach nausea, a resultant of their co-operative aches were very severe and the almost complete blindness that came upon me lasted more than 12 hours the longest spell I have ever had. * * * I had 3 major and several minor ones at the Naval hospital. They did not understand them at all so that is why I am here.* Dr. Ballou, who has my case in charge, is a wonderful man * * * he goes right to the bottom of things * * * he is having me treated for chronic diarrhoca now but is looking after my eyes every day.

"* * * I started out to church today and got 3 blocks on my way when the eye pressure commenced and I turned back none too soon either for both the head and breast ache commenced and were quite severe when I arrived back at the hospital and jumped into bed. In about an hour the spell was gone. My head still aches but the vision dimming is all gone again.

"We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, *and in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education. I would ask to be buried here in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of October or soon after as they are going right after my case properly*" (Emphasis ours).

It thus appears that the language of this letter fully (1) details serious afflictions, symptoms and treatment; (2) that while Mr. Pearl had been discharged from the Naval Hospital, where they did not understand the serious nature of his ailments, the heads of the Veteran's Bureau sent Mr. Pearl to the Mount Alto Hospital, Washington, D.C., for further examination and treatment; that they

were examining him so much that he was nearly worn out, and that he had just had the worst spell from several standpoints that he had ever had; that the headaches, breastaches and stomach nausea were very severe, and that almost complete blindness had come upon him which lasted more than twelve hours, the longest spell he had ever had; (3) that they were going to the bottom of things, and that he had to give reference of next of kin to be notified in case of death, and that he gave the name of Paul Greimann and added *"and in case I die if they do operate, I bequeath you my belongings and property,"* etc.; and (4) *"I do not expect to die, but to be on my way home by the 20th of October or as soon after as they are going right after my case properly"* (Emphasis ours).

The fact that Mr. Pearl believed that an operation was impending is too obvious to warrant further discussion. He expected to survive the operation, but, as he states, in the event they did operate and he did die, he bequeathed Greimann his belongings and property. As the record shows, Mr. Pearl was not operated upon and did not die and lived some thirteen years thereafter and died three years after rejoining his family in Oklahoma.

On Page 8 of Appellee's Brief it is stated with regard to Appellant's Brief that the Brief of Appellant fails to disclose any attempt to study or to analyze the language of the letter in question. The fact is that in said Appellant's Brief on Pages 3-4 the material parts of the said letter appear; on Pages 19-20 appears the specification based on said letter as No. 3; that on Pages 21-24 the language of the letter is analyzed; that on Pages 26-51 the fact that

said letter is a contingent "IF" letter is fully presented, and the further fact that no authority construing such an "IF" letter has held such a letter to be entitled to probate is demonstrated. It thus appears that counsel for appellee is mistaken in the statement that the pertinent language of said letter was not analyzed in Appellant's said Brief.

The above contention on the part of Appellee that the letter presented for probate herein was not contingent and conditioned upon the death of its author as appears from Pages 6-18 of Appellee's Brief, is the only point presented therein.

Authorities relied upon by appellee insofar as in point are against probation of letter as a will.

As supporting the sole contention of appellee herein that the operation of the letter here involved as a will was not contingent upon the death of its author as the result of the contemplated operation counsel present the following authorities:

The American Law of Administration, Third Edition, by Woerner, Pages 70 and 71, and *French* v. *French*, 14 West Va. 458, referred to therein. The quotation from the text of Worner, in substance that the contingent character must appear from the will itself and not from extrinsic evidence, and that as to whether it was the intention of the testator to make the will contingent is the important consideration, correctly states the general rules as is fully presented on Pages 24-36 Appellant's Brief

herein; however, this statement of the general rules immediately follows the statement of the rule applicable to the letter here involved, as follows:

> **"A will is usually absolute in its provisions, but the testamentary character of the instrument itself may be made conditional upon the happening of some event, and is then void as a will unless such event happens. * * *"**

This statement of the controlling rule in the case at Bar is supported by the citations in note (8) on said Page 70 of many of the cases presented on Pages 24 to 51 of Appellant's Brief.

While Woerner refers to the opinion in this French case as "presenting some instructive features" the holding in said French case is not approved by Woerner. As will be later pointed out counsel for appellee omitted the "instructive feature" from the quotation from Woerner.

The language of the will in this *French case* was: "Let all men know hereby, if I get drowned this morning, March 8th, 1872, that I bequeathe all my property, personal and real, to my beloved wife, Florence." It appeared that the testator, Wm. T. French, had no children, and at his death on December 29, 1874, some two years after the execution of the will, he was survived by his widow, Florence, and his father, William French. At the time the will was executed, Florence, his wife, was the sole heir of the testator, Wm. T. French, under the then existing statutes of "DESCENT AND DISTRIBUTION"; however, after the will was executed, and prior to the death of the testator, Wm. T. French, said statute was amended so as to make William French, the father of the testator, his sole heir.

It thus appears that in the event the will was refused probate, the said father would inherit the property of said decedent and not the widow. As appears from the majority opinion in this French case, this fact was controlling in influencing the majority of the court in holding that the will should be probated, and in said majority opinion the fact that the great weight of authority was against the probation of the said will but for the "peculiar surroundings" in this "particular case" as is clearly stated in the opinion as follows:

> "At the time the paper in controversy in the case at bar was written, March, 1872, under the law of descent and distribution then in force the wife was the sole legal heir and distributee of decedent, there being no children nor their descendants. Code of West Va., Chap. 78, Sections 1, 9. In *Lomax Digest,* 3 Vol., Marginal Page 105, it is stated as law that 'Devises are in some cases void *ab initio;* as where the testator devises what the law already gives, etc.;' 'that it is a rule of law that when a testator makes the same disposition of his estate as the law would have done, if he had been silent, the will being unnecessary is void. * * *' Judge Lomax in the passage just quoted from his work has reference perhaps to real estate and not personal, but this I do not determine. But the 10th Section of Chapter 77 of the Code of this State provides, that 'A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless contrary intention shall appear by the will,' and a will is ambulatory and cannot and does not take effect until the death of the testator. In 1873 the Legislature of this State passed an Act entitled 'An Act to amend and re-enact Section 1 of Chapter 78 of the Code of West Virginia, concerning the course of descents,' approved December 22, 1873, which so changed the law of descents in the Code, that on the death of the decedent, he leaving no child nor the descendants of any child, the father was made and became the legal heir as to the real estate. This last named Act was in force in

December, 1874, when William T. French, the decedent, died. *So that between the date of the execution of the will and the death of the decedent the 'legal heir' of the decedent was changed from the decedent's wife to his father.* 'If the law has made a change in heirship between the date of the will and that of the testator's death, the testator will be presumed to have contemplated the possibility of such change, and to have used his words accordingly.' * * *

"It seems to me, if F. makes and executes his will in due form of law, by which he devises his estate to his wife, who at the time of the execution of the will would have been his legal heir if he had then died, but before the death of F. the law is changed, so that the father at the time of his death is his legal heir, the will should ordinarily in that case or a like case be held valid, and not void for that reason; and to that end, if necessary, the court, to carry out the intention of the decedent and to avoid intestacy, would and ought to presume, if necessary, that the will was executed in contemplation that the law might be changed as to heirship before his death. * * *

"It is to be presumed that the decedent and his wife knew at the time said paper-writing was executed, that if the decedent died on that day intestate, his wife was his sole legal heir and distributee of his real and personal estate. What then was the purpose and object of the testator in executing said paper-writing? Had he in so doing the *animo testanda?* How could that quiet her fears? If it was his property that disturbed and distressed her in case of the death of her husband in crossing the river that morning, then the execution of the will could not tend in the least to quiet her fears, for in case of his death on that day she would have been entitled by law to all his property. If it was danger and peril to the life of her husband in attempting to cross the river on that morning in the then condition of the river, the execution of said paper-writing could have given her no relief in mind or feeling, for it was no security against the danger and peril of her husband. * * *

"What was the motive or purpose of the decedent in executing the paper-writing in question in the case at bar, regarding him as a man of sound mind, and considering the evidence in chief of Mrs. French, taken by plaintiff, and the surrounding circumstances and the facts, of which the decedent is presumed to have known, to which I have before referred? Can we conclude that the decedent jestingly executed said paper-writing, and handed it to his wife with directions to take care of it? To do so would be to so determine without sufficient evidence of the fact, in my humble judgment. The acts and verbal declarations of the deceased at the time, do not indicate anything like jest; and the circumstances, which evidently led to its execution, or were the reason therefor, were not such as would be likely to cause a sane man to indulge in a mere jest of that description with his wife distressed for his safety, which could not in fact have been considered by her short of a gross insult, as well as a source of great mortification, for she is presumed to have known the law of descents and distribution as well as the decedent. Mrs. French swears that she thought her husband was in earnest, and to attribute to him the opposite, under the circumstances, would be unnatural.

"Can we consistently and properly construe said paper to be conditional and contingent, that is to say, from the language employed in the said paper-writing *and the surrounding circumstances and the facts which the decedent must have known, that it was the intention of the decedent to do a silly, absurd and useless act, an act without meaning, that he had no reasonable purpose in view, for if it is conceded that the decedent's purpose in executing said paper was that it should not take effect unless he died or was drowned on the morning of its execution, then there is no escaping the conclusion that the decedent in executing said paper-writing and delivering it to his wife to take care of knowingly, in legal presumption, did a silly, absurd, useless and meaningless act, without any purpose or mo-*

tive whatever, such an act as a person in possession of his reasonable senses would not be likely to do.

"If we ascertain his intent in executing said paper-writing to have been to make an unconditional testament giving his property to his wife, who he indicated to be the chief object of his bounty, at his death, then we determine that the decedent in making said paper-writing did a reasonable act, such an act as a reasonable man might well and consistently do. * * *

"In the light of some of the more recent English authorities and Virginia cases which I have cited, and the rules of construction applicable to such a case, I am of opinion, under facts and surrounding circumstances, to which I have alluded, *we may well and properly conclude in this particular case with its peculiar characteristics, that said paper-writing was not intended by the decedent to be provisional and contingent, but was intended by him to be absolute; that the language used by the decedent in the said paper-writing can in his particular case, with its peculiar surroundings, be reasonably interpreted and construed to mean, that he refers to the calamity, and the time during which it may happen, as the reason for making said paper-writing, and not as the condition upon which the disposition of the property is to become operative; and that the will should be interpreted as though it read: 'Lest I get drowned this morning; or lest I die this morning.'* It is no valid objection to carrying out the obvious intention of the testator, if it be not illegal or against good morals, that it is strange, or unnatural or absurd. But such a construction will, if possible, be adopted, as will uphold the will, and bring it as near reason and good sense as practicable. * * *

"After patient and careful consideration of the whole case I am convinced in my own mind, that the decedent seriously executed said paper-writing, and that it was his purpose and intent in so doing to make a testament; that he executed it *animo testandi*, and that it was the intent and purpose of the decedent that said paper-writing should be his unconditional will and

> testament, giving to his wife, Florence, all of his real and personal estate at his death, whether natural or otherwise; *and the court, in order to give effect to the intention of the decednt, will presume that said paper-writing was executed in contemplation of any change of the law of descents as to legal heirship which might be and was made between the date of the said will and the death of the decedent. * * * Under a different state of facts and surrounding circumstances in some material aspects I might have felt myself bound, under the legal authorities, to have come to a different conclusion. But I cannot avoid the convictions of my mind in this novel and peculiar case as I have before stated them. * * *"*

In a dissenting opinion the "President" of the court points out the fact that in the majority opinion it is conceded that the controlling authority is against the probation of the contingent will, and that the unusual, novel and peculiar facts of the case did not warrant the majority in disregarding said authority and probating the will.

It thus appears that neither Worner, nor the opinion in French v. French, supports the contention that the letter involved in the case at Bar should be probated as no unusual, novel and peculiar facts exist to influence the probation of said letter in the face of controlling authority. As will be hereinaftter pointed out all such facts in the case at Bar are against the probation of said letter.

The further fact should be noted that the quotation from this *French case* appearing on Page 11 of Appellee's Brief is not only fragmentary but same omits and stars out the above quoted portion of the opinion *wherein it is stated that said peculiar, novel and unusual facts influenced the decision in favor of the probation of the will. This omission is obviously misleading and required the above full*

presentation of the case to make clear the fact that the opinion in this French case is not only not in point in support of the contention of appellee, but recognizes the rule to be to the contrary, and that the said letter should not be probated. In the case at bar we are not concerned with the question as to whether the said unusual, novel and peculiar facts in this *French case* justified the rendition of the majority opinion in the face of controlling authority, and are only concerned with the fact that the said opinion really holds against the contention of appellee.

2. The second authority cited by appellee is *Eaton* v. *Brown,* 193 U. S. 411, 24 S. Ct. 487, 48 L. ed. 730. In the opinion the court clearly differentiates the provision of the will involved from "IF" instruments, such as the letter in the case at bar, *and cites with approval the controlling authority presented in Appellant's Brief herein.* This case is fully presented on Pages 52-54 of Appellant's Brief, and we refrain from burdening the Court with repetition.

3. In *In re: Boutelle's Estate,* 15 N.W. (Minn. 2d) 506, the third authority cited by appellee, no issue or question relating to a contingent will was presented, and the question was as to the scope of the provision of the will which devised "all books of account." In stating two rules of construction the court held:

> "1. In arriving at what was in testator's mind when he made his will, court will look to entire contents of will, keeping in mind, however, that the language testator has chosen is presumed to express his intention. * * *

> "2. The primary import of isolated words may be modified or controlled by testator's dominant intention where, from his whole will, such intention clearly appears."

Said stated rules are sound and support the contention of appellant herein as is fully presented in Appellant's Brief.

4. In *Barber* v. *Barber* (Ill.), 13 N.E.(2d) 257, the next authority cited by appellee, the fact is, and the court held, *that the language of the will did not even intimate that the bequest was contingent on the death of the testator on the trip referred to, and held to the contrary that one of the letters clearly states that until a will is prepared in legal form and filed away said bequest should be in full force and effect.* In the opinion the court states and approves the principles and rules relied upon by appellant and cites and discusses practically all the cases presented in Appellant's Brief and differentiates same from the rule applicable to the will involved in the *Barber case.* This case is fully presented on Pages 56-57 of Appellant's Brief herein.

5. Appellee then cites Vol. 1, Section 96, Pages 209-210, *Page on Wills* (Lifetime Edition), wherein the general rule that the tendency is to construe wills to be permanent and not contingent where the language thereof will permit. This is sound and is discussed on Pages 24-36 and 60-62, Appellant's Brief. The statement of the above general rule by Page is immediately followed in Section 98 which states the application of same to the specific lan-

guage of a number of wills, and that same had been held o be contingent as follows:

> "A provision 'should anything unfortunately happen to me while abroad, I wish,' or 'If I die at sea or abroad,' or 'If I die before I return from Ireland,' or 'I am going to town with my drill and am not feeling good, and in case I should not get back' or 'As I intend starting in a few days for the State of Missouri, and should anything happen that I should not return alive,' or 'I this day start for Kentucky; I may never get back. If it should be my misfortune,' or 'If I should not come to you again,' or 'If I never get back home I leave you everything I have in the world,' or 'If anything should happen to me while in a hospital for an operation,' or 'If I should die first,' or 'In case I do not recover,' or if anything happened to testator while in Constantinople or on the ocean, or a gift to wife for life 'if I should marry * * * in case she shall survive me' with a gift over in trust 'On the death of my wife, in case I should marry, if she survives me,' **has, in each case, been held to make the will conditional; and if the specified event does not happen, the instrument is not testator's will.**"

In support of this text the following cases are cited:

Goods of Porter, L.R. 2 P. & D. 22, and cases cited there;

Lindsay v. *Lindsay,* L.R. 2 P. & D. 459;

Parsons v. *Lanoe,* 1 Ves. Sr. 189 Ambl. 557;

Magee v. *McNeil,* 41 Miss. 17 (See Page 46, Appellant's Brief;

Morrow's Appeal, 116 Pa. 440, 9 Atl. 660 (Pages 36-38, Appellant's Brief);

Dougherty v. *Dougherty,* 61 Ky. (4 Met.) 25 (Pages 45, 47, 51, Appellant's Brief);

Robnett v. *Ashlock,* 49 Mo. 171 (Pages 41, 49, 51, Appellant's Brief);

Todd's Will, 2 W. & S. (Pa.) 145 (Pages 37, 38, 39, Appellant's Brief);

Maxwell v. *Maxwell,* 60 Ky. (3 Met.) 101 (Pages 41, 43, 45, Appellant's Brief);
Walker v. *Hibbard,* 185 Ky. 795, 11 A.L.R. 832, 215 S.W. 800 (Pages 35, 44, 45, 46, 47, Appellant's Brief);
Davis v. *Davis,* 107 Miss. 245, 65 Sou. 241 Pages 49, 50, Appellant's Brief);
In re Young's Estate, 95 Okla. 205, 219 Pac. 100 (Pages 50-51, Appellant's Brief);
In re Poonarian's Will, 234 N.Y. 329, 137 N.E. 606 (Page 39-41, Appellant's Brief);
Hampton v. *Dill,* 354 Ill. 415, 188 N.E. 419;
Page on Wills, Lifetime Edition, Page 211, Sec. 98.

We submit that Page is an authority against the contention of appellee that the letter here involved is entitled to probation and strongly supports appellant.

6. Section 4639, Compiled Laws of Alaska, 1933, relating to the construction of wills simply enacts the general rule that due regard to the directions of the will and the direct intent and meaning of the testator should be had in all matters brought before the court.

7. *In re: Tinsley's Will* (Iowa), 174 N.W. 4, is next cited by appellee without comment, except to state that the Court will appreciate its significance in determining what is meant by the language used by Mr. Pearl in the letter here involved. The opinion in this *Tinsley case* is presented on Page 56 of Appellant's Brief, *and it appears in the opinion therein that the controlling principles and rules for the construction and classification of testamentary instruments, as to being contingent or general, presented in Appellant's*

Brief are stated and approved; however, they are held inapplicable in the Tinsley case for the reason that the pertinent language used in the will only meant that in case of my death, without stating a specific event.

8. The cases of *Watkins et al.* v. *Watkins Admr.*, 106 S.W. (2d) 975; *In re Forquer's Estate*, 66 Atl. 92; and *Ferguson* v. *Ferguson*, 45 S.W. (2d) 1096, are cited without comment on Page 15 of Appellee's Brief. Same are fully discussed on Pages 47-48, 27-33, 28, 30, of Appellant's Brief, and do not support the contention of appellee.

9. Appellee next cites *In re: Succession of Gurganus*, 20 Sou. (2d) 296, and makes the charge that: "Undoubtedly appellant overlooked this *Gurganus case* purposely. It flatly contradicts and overthrows his contention in this case." *In this Gurganus case, as in the French* v. *French case, supra, Page 5, the quotation in Appellee's Brief from the opinion does not reveal the holding in the case or its application to the sole issue in the case at bar.* In the opinion the court cites with approval several of the leading cases presented in Appellant's Brief and which hold that testamentary instruments conditioned, as the letter in the case at Bar, are contingent and not entitled to probate, and directed attention to the fact that such language did not occur in the will presented and held the said will to be general in its nature and not contingent since it was not stated therein that the will was intended to be operative only during a certain period or until a certain emergency had passed. After discussing and approving opinions holding

that wills containing language in legal effect identical with the letter involved in the case at Bar were not entitled to probate, the court states:

> "We are presented with a case entirely different from those cited by the appellant. In the present will, we find different language: '* * * if anything should happen that I would not return. I want my sisters * * * brothers, * * * to have what I own * * *.'
>
> "Undoubtedly the testatrix was thinking of the possibility of death or she would not have made a will. The will is general in its nature, and the reason assigned for writing the will is general in its nature. It does not appear that it was intended to be operative only during a certain period or until a certain emergency had passed. The authorities cited by the appellant involve wills that clearly show that they were intended to be operative only during a certain period of time or until an emergency had passed. This is not true in the present case. * * *
>
> "Unless terms of will show that it was intended to be contingent, will must be regarded as unconditional. * * *
>
> "The intention of testator governs, and such intention must be ascertained from terms of the will."

Since it clearly appears that this case does not support the contention of the appellee, and is not directly in point in support of the contention of appellant, and only indirectly supports said contention, it is believed that counsel for appellee has no cause to charge counsel for appellant with ulterior motives in not citing same.

10. From *McMerriman* v. *Schill* (Ohio), 140 N.E. 600, Appellee quotes the statement that, in the absence of controlling decisions of the Ohio courts and there being

conflict in the applicable cases from other states and English courts, the court was disposed to follow the holding of the Supreme Court of the United States in *Brown* v. *Eaton, supra,* (Page 12 and Pp. 52-54, Appellant's brief), because of the fact that the wills presented in *Brown* v. *Eaton* and in the *McMerriman case* were identical in legal effect and did not specifically show that the operation of same was contingent on the happening of a specifically stated event, and the situation and status of the testator at the time of his death were the same as when the wills were executed, and that said fact was considered as controlling, as is pointed out in Appellant's Brief herein, on Pages 57-59.

11. Appellee then cites, *In re Morris' Estate* (Pa.), 2 Atl. 761. This case is presented on Page 59 of Appellant's Brief. It clearly appears and the court in the opinion states that the will was not made contingent upon the occurrence of a specifically stated event. *In the letter presented for probate in the case at Bar, the language used specifically limits the operation of the bequest to the occurrence of the death of the testator from the anticipated operation.*

12. Appellee, on Page 22 of said reply brief, cites Paragraphs 3 and 5 of the Syllabus *In re Langer's Estate,* 281 N.Y.S. 866, wherein is stated the general rule that wills will not be regarded as contingent where it can be reasonably held that the testator was merely expressing the inducement to make the will and that, as a general rule, mere matters of inducement do not constitute a condition

which requires the rejection of the will. This general statement of the rule is sound but inapplicable in the case at Bar. In the opinion, with regard to the language of the will involved, it is stated, "There is not to be found in it the statement of a specific hazard or of a specific contingency, such as was found in regard to *Poonarian's Will,* 234 N.Y. 329, 137 N.E. 606, upon which contestants rely." This *Langer case* is presented on Pages 59-60 of Appellant's Brief herein.

13. The contention that Appellant, Byron W. Wood, the administrator and an heir to the estate of the decedant, J. M. Pearl, was not entitled to invoke the aid of the said probate court is not sound.

The Amended Petition of the Appellant, Byron W. Wood, filed in the said probate court, contesting probation of the said letter as the will of J. M. Pearl, deceased, among other things, alleged the following facts and proceedings, which are undenied, and which appear in the transcript:

(1) That the said Byron W. Wood was a full brother and a heir to the estate of the deceased, J. M. Pearl (Page 10, Transcript).

(2) That said Wood is the "duly qualified and acting administrator of the estate of the deceased Pearl, having been appointed by C. J. Blinn, Judge of the District Court of Oklahoma County, on the 31st day of July, 1945. A certified copy of the appointment is hereto attached marked Exhibit 'A' and made a part hereof, by reference."

(3) That, other than the property of the said decedent which is located in Oklahoma, all the estate of said Pearl consisted of personal property located in Alaska.

(4) That, under the provisions of the Compiled Laws of Alaska, either the administrator or heir of an estate may contest the probation of a will purporting to devise the property of the estate.

14. The contention of counsel for Appellee, on Page 18 of Appellee's Reply Brief, that the Motion to Dismiss said Amended Petition and the Demurrer thereto of the Appellee, Greimann, which were filed in and overruled by the probate court, was that Wood "had no standing in the probate court" is likewise unsound for the reason said Motion to Dismiss and Demurrer were abandoned on the trial of the appeal *de novo* in the District Court by the said Griemann, and same were not presented to, considered or passed upon in said trial, and no Motions, Demurrers or Objections of any kind or nature, and no issues of fact were presented on said trial on the part of either party, and the sole question presented to the District Court was one of law and as to whether, under the record, the letter was or was not contingent (Pages 44-46, Transcript).

The fact should be noted that the Brief of Appellee herein shows that said Motion to Dismiss and Demurrer were not presented on said trial in the District Court. That same, on that account, were abandoned as elementary.

15. Likewise, the statement on Page 20 of said Brief that "the trial court ignored this question of jurisdiction in his opinion and decided the case on its merits, disregarding technicalities in pleadings. If we have now a right to do so, we direct the attention of this Court to that question. We believe we have such right as it raises the question of jurisdiction," is erroneous. *The trial court did not ignore any question or issue which arose or was presented on the said trial which related to jurisdiction or otherwise, as appears on Pages 44-46 of the Transcript herein.*

16. The contention that the fact that decedent, J. M. Pearl, was survived by his wife, in the event he died intestate, left said wife as his sole heir is likewise unsound. The record shows that the decedent, J. M. Pearl, was a resident of Oklahoma and had continuously resided in Oklahoma for three years at the time of his death, and that the property of decedent, other than the property located in Oklahoma, was personal property, being money on deposit in escrow. Sections 212 and 213 of Title 84, O.S.A. 1941, control. Said Section 212 in substance provides that the property of an intestate passes to his heirs, *subject to the control and possession of the administrator or executor until distribution is made,* and Section 213 of the same provides for succession as follows:

> "If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares; *but if there be no father or mother, then said*

remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation."

Under the provisions of the statutes of Alaska (C.L. 4400, 4429 and 4431) executors and administrators are entitled to the possession and control of the assets of estates and have the duty of recovering and protecting the property of the said estates, paying claims and distributing same to the heirs or devisees. It thus appears that the Appellant, Byron W. Wood, is entitled, as the duly appointed administrator of the estate of the said J. M. Pearl, deceased, to contest the probation of the letter herein involved.

Aside from the above, as clearly appears from the pleadings, proceedings and judgment set forth in the transcript herein, no issue or question relating to the above contention on the part of the Appellee was pleaded, presented or determined in the trial in the District Court and that the only issue presented and determined on said trial was the question of law as to the proper construction of the said letter.

17. The purported Bill of Exceptions appearing on Pages 62-73 of the Transcript was not filed and presented in time and, on that account, was not allowed and signed and settled by the trial court; however, the sole question of law presented on this appeal is fully supported by the properly certified transcript herein, aside from and independently of said Bill of Exceptions.

18. Aside from that fact, counsel for the Appellee, on Pages 20-21, not only deliberately elects not to attack or to move to strike said Bill of Exceptions, but adopts and refers to the evidence incorporated therein and urges the consideration of said evidence as supporting the Appellee's contention herein

that said letter is entitled to be probated. (See Page 3, under "FACTS" and Page 5 under "PLEADINGS AND PROOF" of Appellee's Brief.) The rule is elementary that where a party elects to recognize, use and rely upon a pleading or document, including a Bill of Exceptions, in the presentation or in the defense of a cause, said party waives the objection that said is not authentic and is estopped from impeaching same. In Sec. 1 on Page 289 of 67 *Corpus Juris,* waiver is defined as the voluntary and intentional relinquishment or abandonment of a known legal right, advantage, or benefit, which, except for the acts, which amount to a waiver, the party could have enjoyed. That waiver results from such conduct as warrants the inference of the relinquishment of such right as the doing of an intentional act which is inconsistent with the claiming of the right, and it is further stated therein that:

> "Waiver occurs where one in possession of any right, either conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it; a waiver takes place where one dispenses with the performance of something which he has a right to expect" (Page 296, *Corpus Juris* 67).

In Sec. 2 thereof, Page 294, it is stated:

> "NATURE OF DOCTRINE. The doctrine of waiver has been characterized as technical, as of some arbitrariness. It is one of the most familiar in the law, prevalent in ancient as well as in modern times throughout every branch of law as well as of practice. It is presented most frequently in those cases which have arisen out of litigation over insurance policies, but it

is a doctrine of general application, confined to no particular class of cases, extending to rights and privileges of any character. * * * It has been said the doctrine belongs to 'the family of,' is of the nature of, is based upon, estoppel. The essence of waiver, it has been stated, is estoppel, and where there is no estoppel, there is no waiver. 'Waiver' and 'estoppel' are frequently used as convertible."

As is stated in Note 48, Page 294, said rule is as follows:

"A rule by which, regardless of absence of any element of estoppel or consideration as those terms are popularly understood, the maxim that one shall not be permitted to blow hot, then with advantage to himself turn and blow cold, within limits sanctioned by long experience as required for the due administration of justice, has been prohibitively applied."

In Section 10, Page 309, same, it is stated:

"Intention need not necessarily be proved by expressed declarations; it may be shown by acts and conduct, from which an intention to waive may reasonably be inferred, as well as by words or declarations—oral or written expressions; * * *."

The above texts are supported by the citations of numerous federal and state cases, and none are cited *contra.*

In 4 *Corpus Juris,* Sec. 1906, under Appeal and Error —"Waiver of Objections to Filing, Settling and Signing Bills of Exception"—it is stated that objections thereto are waived by acquiescence or by the failure to raise the objection or *by conduct inconsistent with the intention to take advantage of such failure.*

In 4 *Corpus Juris,* Section 870, Page 1375, under the same headings the rule is stated to be that "objections

to a bill of exceptions that it is not presented, signed and settled within the time required by statute, are allowed by the court, may be waived by the objecting parties, acquiescence, failure to object promptly, or other conduct inconsistent with the intention to rely on the delay." Certainly said reliance on said bill of exceptions by counsel for Appellee in using the evidence set forth therein in the case at Bar is a waiver of any objections thereto that Appellee might otherwise be entitled to present.

19. The general statement on Pages 20-21, Appellee's Brief, that "the transcript in this case is so irregular, confusing, incorrect and incomplete as to justify a motion to strike the same from the record, but we have refrained from such course of action lest we deceive ourselves by so doing," is erroneous. Counsel points out no defects, and the fact is, the only confusion is such as might result from the fact that said transcript contains the purported Bill of Exceptions *which duplicates a number of the documents which are also set forth in the transcript and, to that extent, is repetitious.* The fact is that the contents of the Bill of Exceptions is the same, insofar as it goes, as the transcript, except that the evidence of Paul Greimann, appears therein on Pages 66-73, which evidence is accepted and urged on the part of Appellee, as is set forth on Pages 22-24, *supra,* this brief.

20. Likewise, the statement on Page 21 of Appellee's Brief that: "Appellant has carried on this appeal in an *ex parte* manner and has failed to serve on Appellee's attor-

ney of record any of the essential appeal papers, except the Notice of Appeal" (R. 46-48), is not supported by the transcript. In addition to showing the due service of Notice of Appeal on Pages 46-49, the transcript further shows that on February 7, 1947, the Assignment of Error and Bill of Exceptions were duly served on Appellee (Tr. 61), and that, on October 21, 1946, counsel for Appellee accepted service of Notice of Appeal (Tr. 77), and that citation to Appellee and Appellee's attorney to appear, etc., were duly served by the deputy United States Marshal (Tr. 89-90). Counsel for Appellee do not point out any notice relating to the appeal herein which the Appellant failed to give Appellee, and the transcript specifically shows that all required notices were duly served.

The fact is, the only irregularity appearing in the record of the proceedings was the failure of counsel for Appellant to present the purported Bill of Exceptions to the trial court for settling and signing within time, and, on that account, the only specifications presented by Appellant on this appeal relate to the construction of the language of the letter presented for probate and the unchallenged allegations of the pleadings. Recognition of the fact that this was an appeal on the transcript no doubt influenced counsel for Appellee to elect to accept and adopt as valid said purported Bill of Exceptions, to the end that the said evidence of Appellee, Paul Greimann, which is set forth in said Bill of Exceptions (Tr. 66-73), might be presented and relied upon by Appellee (see Paragraph 18, Pages 22-24, *supra*);

however, said evidence of the Appellee, Greimann, only serves to corroborate and in no particular militates against the sufficiency and legal effect of the language of the said letter and the pleaded and unchallenged facts which clearly reveal that the operation of the said letter as a will was contingent on specifically stated events which did not occur. Having fully presented the controlling principles and supporting authorities in Appellant's Brief herein, we respectfully submit that the said letter should be denied probate.

Respectfully submitted,

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Attorneys for Appellant.

DECEMBER, 1947.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,

VERSUS

PAUL GREIMANN,
Appellee.

PETITION OF APPELLANT, BYRON W. WOOD, FOR REHEARING

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FEBRUARY, 1948.

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IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS

NINTH CIRCUIT

No. 11553

Byron W. Wood,
Appellant,
versus
Paul Greimann,
Appellee.

PETITION OF APPELLANT, BYRON W. WOOD, FOR REHEARING

Comes now the appellant, Byron W. Wood, and as his petition for rehearing herein, states that heretofore this Honorable Court, on January 19, 1948, filed an opinion and rendered a judgment and decree herein, affirming the judgment and decree of the District Court of the United States for the Territory of Alaska, Fourth District, wherein

the probation of a certain letter as the will of J. M. Pearl, deceased, was affirmed. That said opinion, judgment and decree so affirming said judgment and decree of the District Court, is erroneous and prejudicial to the rights of the appellant, and that, in rendition of the same, the Court overlooked the following controlling uncontroverted facts and applicable principles of law which were duly presented on the part of the appellant:

I. That the statement in said opinion is correct that:

> "It appears that appellee, when a lad of 18 years, met Pearl, some 20 years his senior, in the City of Chicago. They became friends and resided together in Chicago for three years. Pearl and appellee then moved to Alaska and became associated in a garage business under the name of Pearl and Pearl. Appellee addressed Pearl as 'Dad'; this form of salutation was used by appellee at Pearl's request and in turn Pearl addressed appellee as 'son.' The garage business partnership continued for seven years.
>
> "Because of illness Pearl journeyed to Washington, D.C., and was admitted to the Veterans' Hospital in that City. Sometime prior to September 26, 1931, an order discharging Pearl from said hospital seems to have been made, but according to the letter dated September 26, 1931, written by Pearl to appellee, said order of discharge had been revoked and Pearl had been transferred to a different hospital where he had undergone a number of physical examinations. In the letter of September 26, 1931, he described in detail a number of subjective symptoms and concluded the letter in the words hereinbefore set out. Pearl recovered his health and returned to Alaska where he remained until illness required him to return to the mainland some ten years later. He died July 9, 1944, in the Veterans' Hospital at Muskogee, Oklahoma. He left no will other than the bequest contained in the said letter of September 26, 1931."

However, the Court overlooked the controlling effect of the following uncontroverted facts:

1. That at the time said letter was written Pearl and Greimann were partners as to all their property and belongings and same was in the possession and control of Greimann, and in that situation, the terms of the letter were such as might be expected; however, said partnership had been dissolved sometime before Pearl left Alaska and Pearl and Greimann had no mutual property interests for sometime before Pearl left Alaska and returned to Oklahoma.

2. That four years before his death Pearl returned to Oklahoma, purchased a place and rejoined his wife and brother, Byron W. Wood, and the relationship between Pearl and Greimann changed entirely and communication between them during said four years consisted of only one letter and post card and had entirely ceased sometime before Pearl's death in Oklahoma.

3. That said letter was written some thirteen years before the death of Pearl and, although he and Greimann were together in Alaska for approximately nine years after Pearl's return to Alaska, before Pearl departed for Oklahoma, said letter was never referred to or discussed by either, and the assumption must be that same was forgotten.

4. That Greimann, the recipient of the letter, after learning of the death of Pearl in Oklahoma, did not institute proceedings to probate said letter as the will until he

had concluded that the said brother, Byron W. Wood, in Oklahoma, did not intend to claim his estate. This failure evidences the fact that Greimann did not regard the letter as an unconditional will (see Tr. 66-73, herein).

II. In the opinion the Court further concludes:

> "Appellant repeatedly makes reference to an impending operation in support of his argument that the bequest was contingent upon decedent's recovery from an operation, if performed, but as we read the record such a statement finds no support therein. We find in the record no reference that an operation had been advised or contemplated by attending physicians. We think the reference to an operation came into the mind of Pearl because he considered it the only agency which might cause death after the thought of death was suggested by the request of the hospital authorities to give the name of the nearest of kin to be notified in case of death. Naturally that request brought to mind the necessity of providing for disposition of his estate. He thought of appellee over all of those bearing a blood relationship. His thoughts were not of a brother in Oklahoma but of 'Dear (Boy) Paul.' That association of appellee and Pearl had been such that it is logical to conclude that Pearl desired appellee to be the recipient of his property at his death, no matter when it occurred or in what manner occasioned."

While it is true that the said letter in specific terms does not refer to an expected operation, it does in detail state the most serious symptoms and condition of its author and that the physicians and surgeons were going to the bottom of things and had requested him to give references to his next of kin in case of death. Certainly, in this situation, as the Court states in the opinion, naturally Pearl Also reasonably he thought of his partner and partnership contemplated an operation and that death might result.

business in Alaska, and the most natural and reasonable course in this crisis was to write the letter and explain his critical situation and desires as follows:

> "We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, and *in case I die if they do operate I bequeath you* my belongings and property all except $100.00 to be given to Robert Galligher to help him in his education. I would ask to be buried here in Arlington Cemetery. *I do not expect to die but to be on my way home by the 20th of October or soon after as they are going right after my case properly"* (Tr. 5 and 6).

The fact is most respectfully suggested that the use of language better calculated to express the belief that an operation was impending is hardly possible.

It is also true in that most critical situation he thought of Greimann, his partner, as to the ownership of all his property and business and who, in the case of an operation and resulting death, would have the task of carrying on. It is his desire that, in the *contingency of an operation and resulting death*, and consequent failure to return to Alaska, that Greimann have his property and bury him in Arlington; however, as he states therein:

> *"I do not expect to die but to be on my way home by the 20th of October or soon after as they are going right after my case properly."*

Frankly, we respectfully urge that the contingency could hardly be more clearly stated.

It is true that the association of Pearl and Greimann, both socially and in partnership business, at the particular time of the said critical emergency, during which said letter

was written, impelled Pearl to conditionally bequeath to Greimann his said property so owned in partnership, *only, as Pearl specifically states therein, "in case I die if they do operate."* Holding in mind the precarious physical condition of Pearl at the time, his belief that an operation was impending, his fear that he would not survive to return to Alaska, and his business situation, the writing of such letter to his then associate and partner in preparation for such contingency was most natural. The applicable rule as to such letters in the nature of holographic wills, being usually of a temporary nature, is to consider all the facts and circumstances existing at the time the letters are written, and subsequently occurring changes in the relationship and attitude of the parties, in determining as to whether the operation of same as wills should be permanent or contingent (see Pages 24-51, appellant's brief herein for presentation of all the points herein).

Considering this simple and clearly contingent language, it is evident the Court's conclusion that Pearl thereby meant "appellee to be the recipient of his property at his death, no matter when it occurred or in what manner it occurred," resulted from the Court's overlooking the following settled and applicable rules:

> "(1) Where the word 'if' is used in a testamentary instrument, as in the case at Bar, to introduce a specifically stated condition or event, the word must be held to mean 'in that case' and to express the condition or event which must arise or occur as a condition precedent to the operation of the instrument as a will" (see Pages 36-51, brief of appellant herein).

(2) Where, as in the case at Bar, the language of the testamentary instrument is plain and clear, both in its expression and in its meaning, the application of rules of construction is unnecessary (see Pages 60-61, brief of appellant herein). There is no suggestion or contention and none are warranted that the language of the letter is in any degree uncertain or ambiguous in its meaning. No reason, legal or otherwise, appears for eliminating by construction the specific contingencies in the language, "in case I die if they do operate, I bequeath you my property, etc." It is urged that said conclusion, in the face of such clear contingent words, to be absolute and unconditional is erroneous. To justify this conclusion of the Court the words, "in case I die if they do operate," must have been for some reason stricken. Since the bequest could not operate until after death, same must have been considered surplusage.

(3) In the opinion, the Court further states:

> "In speaking of the operation Pearl was merely speaking of the circumstances which induced him to make the testamentary disposition. In so construing the language of the letter we are in accord with the tendency of the courts to construe similar language as the reason for executing a will rather than as a precedent to its validity if such a construction can reasonably be made" (Page on Wills, Lifetime Edition, Vol. 1, Sec. 96, Pp. 209, 210).

It is true that in Sec. 96, Page on Wills, it is in substance stated that the tendency is to treat the statement of circumstances which induced the making of a testamentary disposition as the reason for executing the will rather than as a precedent to its validity where such construction does

not do violence to the clear meaning of the language employed; however, Page clearly states the rule to be that the clear meaning of the language used must control (see Pages 13-15, appellant's reply brief herein where Page and other authorities are presented).

That in so construing the language of the letter, which is, "in case I die if they do operate, I bequeath you, etc." to be "merely speaking of the circumstances which induced him to make the testamentary disposition" *the Court overlooked the controlling fact that such language specifically states that the bequest is "in case I die if they do operate," which is a specifically stated condition and not a reference to a mere inducement.*

That in so construing said language the Court overlooked the fact that said events, being the operation and resulting death, are so clearly stated as the reason for the letter and the bequest is so clearly made contingent upon said events, and same are so interrelated and dependent, that the operation of the letter is conditioned upon the happening of the specifically stated events. Such is the holding of all the authorities (Reference is made to Pages 24-54, appellant's brief herein, where said rule is fully presented with supporting authorities).

(4) In the opinion herein, the Court further states:

> "Furthermore such a construction follows the rule that intestacy is not favored."

While the general rule is that intestacy is not favored, *it is also a well recognized rule that where, as in the case at Bar, the language of the testamentary instrument is*

plain and clear, both in its expression and in its meaning, the application of rules of construction is unnecessary (see cases cited and presented on Pages 61-62, appellant's brief herein).

Further, such presumption has no application to the case at Bar, in that the same applies only where the question is as to whether or not all of the property of the estate is devised and not as to whether the language of the instrument is or is not contingent, and has no application as against the presumption that the author of the letter did not intend to disinherit his legal heirs. Sec. 1147, Page 95, 69 C.J., cited in the opinion, supports the above statement. *The clear and unambiguous language of the letter leaves no toe-hold for construction or presumption.* The contingent language "in case I die if they do operate I bequeath you" could possibly have but one meaning.

(5) In the opinion herein the Court further states:

> "Instances of wills containing words of clear condition, if literally construed, which were none-the-less held to be absolute and valid are":
>
> *In re: Kayser's Estate* (Pa. Orph.), 38 Burkes 205;
> *In re: Fouquer's Estate* (Pa.), 66 Atl. 92;
> *Eaton* v. *Brown*, 193 U.S. 411, 24 S. Ct. 487, 48 L. ed. 730.

In so stating that the wills involved in said above cases contained words of clear condition, if literally construed, the Court overlooked the controlling fact in each case that the language involved therein did not refer to the stated events as specific contingencies or conditions precedent to the operation of the instruments as wills, as does the language presented in the case at Bar.

In re: Kayser's Estate, supra, the language is:

> "In case something should happen to me before I have a chance to see Mr. Trexler, this is my last will and testament."

Obviously, this was not the expression of a specific contingency that if he did see Trexler the will was inoperative and the holding of the court was *that the language used did not specifically make death before the testator had a chance to see Mr. Trexler as a condition precedent to its operation.*

In re: Fouquer's Estate, supra, the pertinent language was:

> "Should anything befall me while away or that I should die, then, in that event, all my estate, etc."

That such language contained no specific statement that the will should not be operative unless something should befall the testator or that he should die on the trip, is evident and was the conclusion in the opinion. *The facts and holdings in this case are fully presented on Pages 30-34 of Appellant's Brief, and it appears from the opinion therein that same is against the contention of appellee and supports that of appellant.*

In *Eaton* v. *Brown, supra,* the pertinent language is:

> "I am going on a journey and may not ever return. If I do not, this is my last request."

Same does not specifically state that failure to return was a specific precedent contingency to the operation of the will, *as did the pertinent language in the case at Bar make death from the expected operation such condition preced-*

ent. This *Eaton case* is fully presented on Pages 52-54, Appellant's Brief herein, and when the language presented in the *Eaton case* and in the case at Bar is carefully analyzed, and the authorities and reasoning in the *Eaton case* applied to the language involved in the case at Bar, it will be clear that the *Eaton case* supports appellant's contention. Some of the pertinent reasoning in this *Eaton case* is as follows:

> "There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, *the primary import of isolated words may be held to be modified and controlled by the dominant intention, to be gathered from the instrument as a whole.*"

We should bear in mind that the contingency expressed in the letter in the case at Bar was not in the nature of "isolated words." The contingency expressed was the "dominant intention." On the other hand, the language used is clear and specific and "unmodified" and "in case I die if they do operate, I bequeath you," etc.

In this opinion, it is further stated:

> *"We need not consider whether, if the will had nothing to qualify these words, it would be impossible to get away from the condition.* But the two gifts are both of a kind that indicates an abiding and unconditioned intent—one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipworth* v. *Cabell,* 19 Gratt. 758, 783. *And then she goes on to say that all she*

> *has is her own hard earnings and that she proposes to leave it to whom she pleases.* This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property; not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty—an hypothesis which is to the last degree improbable in the absence of explanation—it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which, on the face of it, has reference to an unconditioned gift."

It thus appears that the Court in this *Eaton case* bottomed its conclusion on considerations presented in the will other than the above quoted language, while in the case at Bar there are no such considerations and the language is specific and contingent.

In the opinion in the *Eaton case* the court discusses some of the leading cases as follows:

> "It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, 'my wish, desire and intention now is that if I should not return (which I will, no preventing Providence).' *Todd's Will,* 2 Watts. & S. 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word 'now.' Somewhat similar was *Porter's Goods,* L.R. 2 Prob. & Div. 22, where Lord Penzance said, if we correctly understand him, that, if the only words adverse to the will had been 'should anything unfortunately happen to me while abroad,' he would have held the will conditional. See *Mayd's Goods,* L.R. 6 Prob. Div. 17, 19."

From this discussion it is evident that the Court in the Eaton case, had the language been that presented in the case at Bar, would certainly have held that his letter was contingent.

In this *Eaton case* the Court closes the opinion with the statement:

> "It hardly is worthwhile to state them at length, as each case must stand so much on its own circumstances and words."

That the concluding above quoted statement in this opinion is also presented in Appellant's Brief herein, *and the Court's attention is respectfully directed to the fact that no authority, rule of construction, or presumption is required to clarify the meaning of such simple English words as "in case I die if they do operate, I bequeath you" etc., as in the letter here involved. Neither contingency so clearly expressed can fairly be discarded.*

The appellant most respectfully but earnestly urges that, in reaching the conclusion that the pertinent language, "in case I die if they do operate, I bequeath you," etc., does not express contingencies as a condition precedent to the operation of the letter as a will, the Court erred and violated the above stated principles of law and the controlling rule that the Court, under the guise of construing an instrument, will not write a new will, and the clear and unambiguous language used by the testator in the instrument must control, and the Court must not construe that language so as to cause same to express what the testator did not intend (see Pages 61-62, appellant's brief herein).

Wherefore, appellant prays the Court to grant a rehearing herein.

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Counsel for Appellant.

FEBRUARY, 1948.

CERTIFICATE

James R. Eagleton and Charles E. McPherren, counsel of record for appelant, hereby state and certify that in our judgment the above petition for rehearing in the above cause is well founded and that same is not filed for delay.

JAMES R. EAGLETON,

CHARLES E. MCPHERREN,
Counsel for Appellant.

FEBRUARY, 1948.

No. 11554

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. R. MASON,

Appellant,

vs.

MERCED IRRIGATION DISTRICT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division

FILED

MAY 8 - 1947

PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 870 Brannan Street, San Francisco

No. 11554

United States Circuit Court of Appeals

For the Ninth Circuit.

J. R. MASON,

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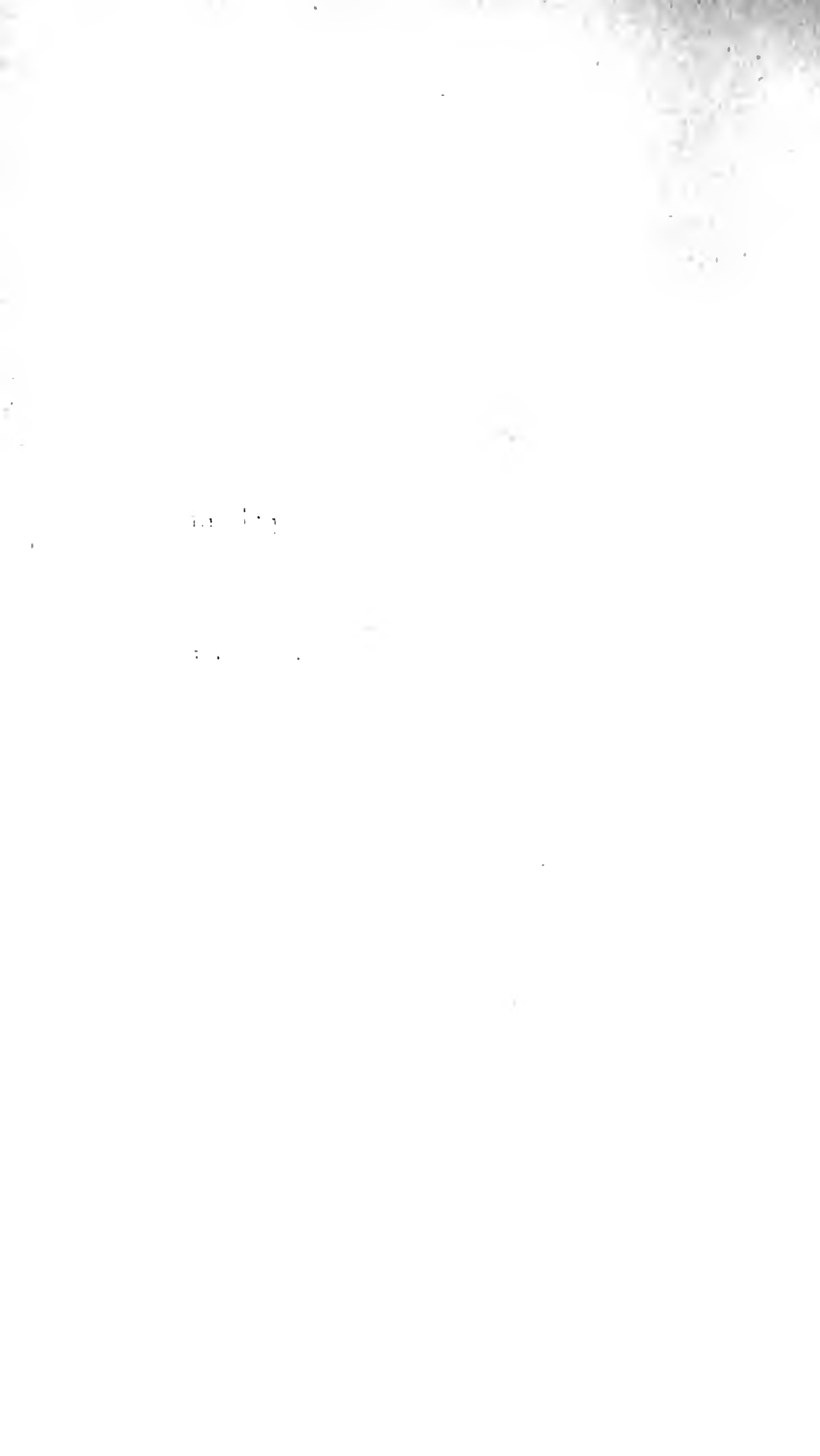
MERCED IRRIGATION DISTRICT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division

Rotary Colorprint, 870 Brannan Street, San Francisco



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the Southern District of California
Northern Division

In Bankruptcy No. 4818

In Proceedings for Confirmation of a Plan of Composition of Bond Indebtedness

In the Matter of

MERCED IRRIGATION DISTRICT,
Debtor.

INTERLOCUTORY DECREE

The petition of Merced Irrigation District for confirmation of a plan of composition of its bond indebtedness heretofore came on duly and regularly for hearing before this Court, said Irrigation District appearing by its counsel, C. Ray Robinson, Hugh K. Landram and Stephen W. Downey, and objectors appearing by counsel as follows: Messrs. Freidenrich & Selig and Kirkbride & Wilson, appearing for Claire S. Strauss; Messrs. Brobeck, Phleger & Harrison, appearing for Florence Moore, et al; Messrs. tum Suden and tum Suden appearing for Minnie Rigby and Richard tum Suden as executors, etc. of the estate of Wm. A. Lieber; Hugh K. McKevitt, Esq., appearing for Pacific National Bank of San Francisco; Charles L. Childers, Esq., appearing for West Coast Life Insurance Company; Clark, Nichols & Eltse appearing for Mary E. Morris; Chase, Barnes & Chase, Esqs.,

appearing for R. D. Crowell and Belle Crowell and Coburn Cook, Esq., appearing for Milo W. Bekins, et al. Thereupon the Court proceeded to hear [2] the allegations and proofs in support of said petition and plan of composition and all matters and things pleaded and offered to controvert the facts in said petition and in opposition to said plan of composition. The said petition and said matters and objections having been duly and fully heard and argued and the hearing as to all parties having been concluded and the matter duly submitted to the Court by and on behalf of all parties, and the Court having considered all objections to said petition and said plan of composition and having filed herein a memorandum setting forth its conclusions with respect to the facts and the law and having made and entered its written Findings of Fact and Conclusions of law in addition to those set forth in said memorandum and having found and now finding as follows, to-wit:

1. That petitioner, Merced Irrigation District, is an irrigation district duly formed, organized and existing under and by virtue of the provisions of the California Irrigation District Act of the State of California and said District is an eligible petitioner within the terms and meaning of Public No. 302 enacted by the Seventy-fifth Congress and Approved August 16, 1937 (now designated as Chapter IX of the Bankruptcy Act of the United States) and that the petition herein was filed pursuant to the provisions of said Act approved August 16, 1937.

2. That petitioner is located wholly in the County of Merced, in the Southern Judicial District of California, Northern Division, and within the territorial jurisdiction of this court; that proof of due publication and mailing of the notice of creditors heretofore ordered by this Court has been duly filed; that such notice was first duly published as required by law and the order of this Court, and that copies thereof were duly mailed to each of the creditors at their last known postoffice addresses at least sixty (60) days before the date fixed for hearing and as required by law and this court. That notice has been duly and regularly given in time, form and manner as required by law and this Court and that said petition was duly and regularly continued from time to time until Monday the 21st day of November, 1938, at 10 o'clock a.m. of said day when said petition and all objections thereto came duly and regularly on for hearing and were heard.

3. That the filing of the petition herein was authorized by proper resolution duly passed and adopted by the Board of Directors of petitioner prior to the filing thereof and that the fees required by the act hereinbefore mentioned were duly paid.

4. That petitioner, Merced Irrigation District, is insolvent and unable to meet its debts as they mature and desires to effect a plan of composition of its outstanding bond indebtedness. That petitioner did heretofore duly adopt such plan of composition and that said plan of composition is set

forth in the petition herein and is as follows, to-wit:

"That outstanding bonds of said district in the total principal sum of Sixteen Million, One Hundred Ninety thousand Dollars ($16,190,000.00), with all interest coupons appurtenant thereto and right to interest due on said bonds as of July 1, 1933, and subsequently thereto, be retired by the payment in cash for each bond of a sum equal to 51.501 cents for each dollar of principal amount thereof. If any bond be presented with any appurtenant interest coupon maturing on or before July 1, 1934, missing, there shall be deducted from the amount payable thereon 44.78 cents for each dollar of the face amount of such missing coupon, and if any bond be presented with any appurtenant unpaid interest coupon maturing subsequent [4] to July 1, 1934, missing, there shall be deducted from the amount payable thereon a sum equal to the full face value of such missing coupon; provided, however, that where deductions are made on account of missing coupons and thereafter such missing coupons are presented, there shall be paid to the holder thereof an amount equal to the sums which were originally deducted from the sum paid on account of such bonds to which such coupons appertained. That such payment be made out of a loan of Eight Million Three Hundred Thirty-eight Thousand Eleven and 90/100ths Dollars ($8,338,011.90) heretofore authorized and allocated for that purpose by the Reconstruction Finance Corporation, an agency of the United States of America

to or for the benefit of the Merced Irrigation District. That to evidence said loan Merced Irrigation District issue and deliver its refunding bonds in the principal sum of Eight Million Three Hundred Thirty-eight Thousand Eleven and 90/100ths Dollars ($8,338,011.90) to said Reconstruction Finance Corporation and accept in exchange for all or any part thereof, on the basis aforesaid, such bonds of petitioner held or purchased by said Reconstruction Finance Corporation, to the end that the district will reduce its outstanding bond indebtedness from the principal sum of Sixteen Million One Hundred Ninety Thousand Dollars ($16,190,000.00) to the principal sum of Eight Million Three Hundred Thirty-eight Thousand Eleven and 90/100ths Dollars ($8,338,011.90) bearing interest at the rate of four per cent (4%) per annum. [5]

"The district, therefore, by such plan of composition proposes and offers the holders of its outstanding bonds cash equal to 51.501 cents for each dollar of principal amount of said bonds upon surrender of such bonds and all interest coupons and right to interest appurtenant thereto which matured or became due July 1, 1933, and subsequently thereto."

That the plan of composition as offered by the petitioner herein is fair, equitable and for the best interests of its creditors and does not discriminate unfairly in favor of or against any creditor or creditors or class of creditors; that the plan of composition complies with the provisions of Section

83, Chapter IX of the Bankruptcy Act of the United States, and all of the provisions of Public No. 302 enacted by the Seventy-fifth Congress, approved August 16, 1937. That before the filing of the petition herein, said plan of composition was accepted and approved in writing by or on behalf of creditors of petitioner owning and holding more than ninety per cent (90%) of the aggregate amount of claims of all classes affected by such plan, excluding, however, claims owned, held or controlled by petitioner; that all amounts to be paid by petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable and that the offer of the plan and its acceptance are in good faith and petitioner is authorized by law upon confirmation of the plan to take all action necessary to carry out the terms thereof.

5. That prior to the filing of the petition herein the Reconstruction Finance Corporation, an agency of the United States, pursuant to contract with petitioner, purchased at the composition rate aforesaid, and ever since has owned, held and controlled and [6] now owns, holds and controls, over 90% of the outstanding bond indebtedness of said District, to-wit, the Reconstruction Finance Corporation now owns, hold and controls approximately Fourteen Million Seven Hundred Two Thousand Dollars ($14,702,000.00) principal of the outstanding Sixteen Million One Hundred Ninety Thousand Dollars ($16,190,000.00) principal bond indebted-

ness of said District. That said Reconstruction Finance Corporation is a creditor of petitioner in the amount of the full face value of said bonds so owned, held and controlled by it. That there are no bonds owned, held or controlled by said petitioner district. That before the filing of the petition herein, said Reconstruction Finance Corporation, in writing, accepted the plan of composition hereinbefore set forth and its acceptance is attached to the petition herein.

6. That all of the allegations and averments set forth in said petition for confirmation of the plan of composition of bond indebtedness are true; and that all the denials of said petition set forth in the answers of objectors are untrue.

7. That heretofore on the 18th day of April, 1935, petitioner herein filed in this Court a petition for debt readjustment under and pursuant to an Act of Congress approved May 24, 1934, Chapter 345, and designated as Sections 78, 79 and 80 of the Bankruptcy Act of the United States. That by said proceeding petitioner sought to confirm a plan of readjustment of its bond indebtedness under which the holders thereof would receive $515.01 for each $1000 bond and interest coupons due July 1, 1933 and subsequently thereto. That thereafter on the 4th day of March, 1936, judgment was entered by the above Court confirming said plan of readjustment. That thereafter an appeal to the United States Circuit Court of Appeals for the Ninth Circuit was taken from said judgment in said pro-

ceeding by certain of the objectors here represented. That before said appeal could be heard and before the record on appeal was prepared or printed, the United States Supreme Court on May 25th, 1936, in Ashton v. Cameron County Water Improvement District, 298 U. S. 513, adjudged the congressional legislation pursuant to which said proceeding was commenced and prosecuted, to-wit, said Act of Congress approved May 24, 1934, Chapter 345 and designated as Sections 78, 79 and 80 of the Bankruptcy Act of the United States to be unconstitutional. Thereafter on March 16, 1937, appellants in said proceeding filed a motion in the United States Circuit Court of Appeal for the Ninth Circuit praying that the printing of the record on appeal be dispensed with and that the cause be advanced on the calendar and submitted and that an order be made forthwith reversing the decree with directions to dismiss the cause on the ground that jurisdiction of the District Court to render said decree depended altogether on the Act of Congress held to be unconstitutional by the United States Supreme Court as aforesaid, and that the District Court had no jurisdiction to render the decree appealed from. Thereafter on the 12th day of April, 1937, the United States Circuit Court of Appeals granted said motion and pursuant thereto reversed the decree of the District Court and by mandate directed this court to dismiss the entire case (89 Fed. (2d) 1002) and thereafter petition for certiorari was denied by the Supreme Court of the United States (302 U. S. 709). The court

finds that said proceeding so dismissed was based upon a law wholly null and void and which conferred no jurisdiction upon the court [8] and that there was no judgment on the merits in said proceeding. The court finds that the proceeding now before this court is based upon an entirely different law and one which does confer jurisdiction upon the court, and that petitioner herein is not barred in this proceeding by res adjudicata or otherwise.

8. The court finds that on the 27th day of July, 1937, and prior to the enactment of Public No. 302 enacted by the Seventy-fifth Congress and approved August 16, 1937 (now designated as Chapter IX of the Bankruptcy Act of the United States), petitioner herein brought a proceeding in the Superior Court, County of Merced, State of California, under the terms of an act of the legislature of the State of California passed in 1937 and therein designated as "Irrigation District Refinancing Act" Statutes of California, 1937, Chapter 24. That in and by said proceeding petitioner sought the benefits of said act with respect to a plan of readjustment of its bond indebtedness under which outstanding bonds of consenting bondholders would be retired by payment of $515.01 for each $1000 principal amount and interest due July 1, 1933, and subsequently, and pursuant to which, if and when said plan should be confirmed by the court the bonds of non-consenting bondholders would be condemned and their value fixed as in said act provided. That thereafter a hearing upon said plan

was held by the court as provided by Section 8 of said Irrigation District Refinancing Act and certain of the objectors here represented objected to the plan and appeared in opposition thereto. That thereafter on March 10, 1938, Albert F. Ross, Judge of the Superior Court presiding, announced that he was prepared to enter an interlocutory judgment pursuant to Section 8 of said Irrigation District Refinancing Act and directed that Findings and such interlocutory judgment be prepared by petitioner pursuant to said Section 8. That no findings or interlocutory judgment have been prepared, signed or entered and nothing further has been done in said proceeding. That said action pending in the State Court does not prejudice or bar the commencement, maintenance or prosecution of this proceeding.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the plan of composition as proposed and presented and contained in said petition be and the same is hereby confirmed and approved.

That all of the outstanding bonds and other indebtedness of petitioner that are affected by the plan, as set forth, itemized and enumerated in the petition in this cause, are of one and the same class, are payable without preference out of funds derived from the same source or sources, and are hereby allowed as obligations of the petitioner, whether presented or not, and that the several holders thereof are entitled to participate ratably in the distribution of the funds in accordance with

the plan of composition and the decrees of this court as hereinafter provided.

That in order to provide the funds necessary to pay the incidental expenses and to pay for the outstanding bonds of the petitioner as contemplated by the plan of composition aforesaid and the orders of this court, petitioner is hereby authorized forthwith to duly issue and sell its refunding bonds to the Reconstruction Finance Corporation in amounts required to pay such incidental expenses and to pay the sum equal to 51.501 cents on the dollar of the principal amount of its outstanding bonds (not purchased by the Reconstruction Finance Corporation), and to repay the Reconstruction Finance Corporation the money expended by it, to-wit: 51.501 cents on the dollar on the principal amount of [10] the outstanding bonds purchased by it. That the old bonds so purchased by the Reconstruction Finance Corporation will thereupon be cancelled and returned to petitioner and that each and all of said refunding bonds so issued and sold by the petitioner to the Reconstruction Finance Corporation, as provided herein, are hereby declared to be valid obligations of such district and shall not at any time be affected by the plan of composition, or these proceedings.

That during the pendency of these proceedings the Reconstruction Finance Corporation is authorized to purchase from the holders thereof any of the outstanding bonds of petitioner upon the following terms and conditions, to-wit: The Recon-

struction Finance Corporation to pay the sum of 51.501 cents on each dollar of the principal amount of the outstanding bonds, paying nothing on interest, and deducting from said amounts for missing coupons as provided in this decree for payment of the outstanding bonds by the disbursing agent. That when purchased, as provided in this paragraph, the old bonds shall be delivered to the Reconstruction Finance Corporation and held by it as security for the funds furnished by it for such purpose, with interest thereon at 4% per annum, until such time as it receives from petitioner its refunding bonds for such disbursements and interest, or petitioner may pay such interest and deliver bonds for the principal.

That the petitioner within sixty (60) days from the time this decree becomes final, or such additional time as the Judge may allow, set aside and deposit in trust with the Treasurer of Merced Irrigation District, who is hereby appointed as disbursing agent of this court, the sum necessary to pay the holders of its outstanding bonds, other than bonds which shall have been purchased by the Reconstruction Finance Corporation as herein provided 51.501 cents on the dollar of the unpaid principal amount thereof, excluding all interest due or to become due and which matured July 1, 1933, and subsequently thereto, and the holders of said bonds be and they are hereby required to deposit said bonds with all unpaid interest coupons attached with the disbursing agent before payment

is made as herein provided; that if any bonds are so deposited with any unpaid interest coupons due on or before July 1, 1934, missing, the disbursing agent shall make a deduction from the amount to be paid therefor, a sum equal to 44.78 cents for each dollar of the face amount of such missing coupons, and if any bond be presented with any unpaid interest coupons maturing after July 1, 1934, missing, deductions shall be made from the amount to be paid therefor equal to the full face value of the missing coupons. In case any deductions are made on account of missing coupons, and such coupons are afterwards deposited within the time prescribed by this decree, there shall be paid to the holder of such missing coupons the amount deducted therefor; that when payments shall have been made for the old bonds and coupons as provided in the plan of composition and this decree, the disbursing agent shall mark said bonds and coupons so paid "Cancelled" and return them to the petitioner.

That in the event any of the old bonds and interest coupons are not surrendered to the disbursing agent within sixty (60) days after receipt by such agent of the money with which to retire the same, or such additional time as the judge may allow, then the proportionate sum to which the holders thereof may be entitled under the plan of composition, and terms of this decree, shall be paid by the disbursing agent to the clerk of this court as Registrar, and thereafter paid by him to the

holders of such bonds in [12] accordance with the provisions of this decree and such further decrees of this court as made in reference to the payment of such bonds.

That the clerk of this court shall cause to be published in the Merced Sun-Star and The Wall Street Journal, Pacific Coast Edition, newspapers published in Merced and San Francisco, respectively, for two successive issues notice to the holders of the outstanding bonds of the petitioner directing every holder thereof to deposit any and all bonds of the petitioner with the disbursing agent within the sixty (60) day period above provided or thereafter with the clerk of this court for payment in accordance with this decree or be forever barred from claiming or asserting as against petitioner or any individually owned property located within petitioner district or the owners thereof any claim or lien arising out of said bonds; provided, however, that nothing contained herein shall preclude the Reconstruction Finance Corporation from asserting its rights and claims under the old bonds so purchased by it to the extent and amount so expended in acquiring the same, with interest thereon at the rate of 4% per anum, until petitioner shall have delivered to the Reconstruction Finance Corporation its refunding bonds in form satisfactory to said Reconstruction Finance Corporation in the aggregate principal amount equal to the money so expended in acquiring such old bonds, with interest.

That after the expiration of sixty (60) days from

the date of receipt of the funds to carry out the terms of the plan of composition and retire the outstanding indebtedness as provided in such plan, the disbursing agent shall make full and complete report to this court for confirmation, including an itemized statement of all receipts and disbursements together with a list of old bonds outstanding at the time of such report, showing serial number of and amount of each outstanding unpaid bond.

That any and all holders of the outstanding bond indebtedness of petitioner district be and are hereby enjoined, pending the entry of final decree herein, from attempting the enforcement or collection of any claim, judgment or lien, by legal proceedings or otherwise, which they may have against petitioner or against any of the lands situated within petitioner district and held by individuals.

Dated: February 21, 1939, at 1:05 p.m.

/s/ PAUL J. McCORMICK,
Judge. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT (UNDER RULE 73).

Notice is hereby given that West Coast Life Insurance Company, a corporation; Pacific National Bank of San Francisco, a national banking associa-

tion; Mary E. Morris; R. D. Crowell; Belle Crowell; Claire S. Strauss; Minnie E. Rigby as Executrix, and Richard tum Suden as Executor, of the Last Will of William A. Lieber, Alias, Deceased; Florence Moore; American Trust Company as trustee under a certain agreement between R. S. Moore and American Trust Company dated December 15, 1927; Crocker First National Bank, as trustee under a certain agreement between Florence Moore and Crocker First Federal Trust Company, dated December 15, 1937; Milo W. Bekins and Reed J. Bekins as trustees appointed by the will of Martin Bekins, deceased; Milo W. Bekins and Reed J. Bekins as trustees appointed by the will of Katherine Bekins, deceased; Reed J. Bekins; Cooley Butler; Chas. D. Bates; Lucretia B. Bates; Edna Bicknell Bagg; John D. Bicknell Bagg; Mary B. Cates; Nancy Bagg Eastman; Charles C. Bagg; Horace B. Cates; Barker T. Cates; Mary Edna Cates Rose; [16] Mildred C. Stephens; N. O. Bowman; W. H. Heller; Fannie M. Dole; James Irvine; J. C. Titus; Sam J. Eva, William F. Booth, Jr., George N. Keyston, George W. Pracy, H. T. Harper, and George B. Miller as trustees of Cogswell Polytechnical College; Tulocay Cemetery Association, a corporation; Percy Griffin; Emogene Cowles Griffin; D. Lyle Ghirardelli; A. M. Kidd; Grayson Dutton; Frances N. Shanahan; Stephen H. Chapman; Edith O. Evans; J. Ofelth; Dante Muscio; I. M. Green; E. J. Greenhood; Julia Sunderland; Lily Sunderland; Florence S. Ray; Joseph S. Ray; Amelia Kingsbaker; S. Lachman Company,

a corporation; Sue Lachman; Sophia Mackenzie; Nettie Mackenzie; R. J. McMullen; J. R. Mason; Gilbert Moody; William Payne; G. H. Pearsall; Alice B. Stein; Sherman Stevens; E. G. Soule; Margaret B. Thomas; Isabella Gillett and Effie Gillett Newton as executrices of the estate of J. N. Gillett, deceased; Theo. F. Theime; Fletcher G. Flaherty; Frances V. Wheeler; Miriam H. Parker; Apphia Vance Morgan; First National Bank of Pomona; George F. Covell; Alma H. Woore; George Habenicht; Seth R. Talcott; Adolph Aspegren; J. H. Fine; Mrs. J. H. Fine; F. F. G. Harper; and W. S. Jewell, creditors of Merced Irrigation District and respondents in this cause hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Interlocutory Decree entered in this action on February 21, 1939, the same being the Interlocutory Decree entered after the hearing upon the plan of composition and from the whole thereof.

Dated: March 28th, 1939.

/s/ CHAS. L. CHILDERS,
Attorney for West Coast Life Insurance Company.

/s/ HUGH McKEVITT,
Attorney for Pacific National Bank of San Francisco.

CLARK, NICHOLS & ELTSE.
/s/ By GEORGE CLARK,
Attorneys for Mary E. Morris.

CHASE, BARNES & CHASE.
/s/ By LUCIUS F. CHASE,
Attorneys for R. D. Crowell and Belle Crowell.

/s/ DAVID FREIDENWICH,
Attorney for Claire S. Strauss.

/s/ PETER TUM SUDEN,
Attorney for Minnie E. Rigby as Executrix, and Richard tum Suden as Executor, of the Last Will of William A. Lieber, Alias, Deceased.

BROBECK, PHLEGER & HARRISON.

/s/ By EVAN HAYNES,
Attorneys for Florence Moore; American Trust Company as trustee under a certain agreement between R. S. Moore and American Trust Company dated December 15, 1927; Crocker First National Bank, as trustee under a certain agreement between Florence Moore and Crocker First Federal Trust Company, dated December 15, 1937.

/s/ W. COBURN COOK,
Attorney for Milo W. Bekins and Reed J. Bekins as trustees appointed by the Will of Martin Bekins; deceased; Milo W. Bekins and Reed J. Bekins as trustees appointed by the Will of Katherine Bekins, deceased; Reed J. Bekins; Cooley Butler; Chas. D. Bates; Lucretia B. Bates; Edna Bicknell Bagg; John D. Bicknell Bagg; Mary B. Cates; Nancy Bagg Eastman;

Charles C. Bagg; Horace B. Cates; Barker T. Cates; Mary Edna Cates Rose; Mildred C. Stephens; N. O. Bowman; W. H. Heller; Fannie M. Dole; James Irvine; J. C. Titus; Sam J. Eva, William F. Booth, Jr., George N. Keyston, George W. Pracy; H. T. Harper, and George B. Miller as trustees of Cogswell Polytechnical College; Tulocay Cemetery Association, a corporation; Percy Griffin; Emogene Cowles Griffin; [18] D. Lyle Ghirardelli; A. M. Kidd; Grayson Dutton; Frances N. Shanahan; Stephen H. Chapman; Edith O. Evans; J. Ofelth; Dante Muscio; I. M. Green; E. J. Greenhood; Julia Sunderland; Lily Sunderland; Florence S. Ray; Joseph S. Ray; Amelia Kingsbaker; S. Lachman Company, a corporation; Sue Lachman; Sophia Mackenzie; Nettie Mackenzie; R. J. McMullen; J. R. Mason; Gilbert Moody; William Payne; G. H. Pearsall; Alice B. Stein; Sherman Stevens; E. G. Soule; Margaret B. Thomas; Isabella Gillett and Effie Gillett Newton as executrices of the estate of J. N. Gillett, deceased; Theo F. Theime; Fletcher G. Flaherty; Frances V. Wheeler; Miriam H. Parker; Apphia Vance Morgan; First National Bank of Pomona; George F. Covell; Alma H. Woore; George Habenicht; Seth R. Talcott; Adolph Aspegren; J. H. Fine; Mrs. J. H. Fine; F. F. G. Harper; and W. S. Jewell.

Copies mailed to Stephen H. Downey, C. Ray

Robinson, Hugh Landran, Attorneys for Debtor, and to Reconstruction Finance Corp. 3/30/39.

E. L. S. [19]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINAL DECREE

Comes now J. R. Mason, one of the creditors of the above named District, and states that he has through courtesy of counsel received a copy of the proposed Final Decree, Discharge and Order Settling Report and Account of Disbursing Agent herein and objects to the proposed Final Decree and to the proposed draft thereof in the following respects:

1. Said creditor objects to that part of the proposed Final Decree which provides a period or time limit of twelve months for presentation of outstanding old obligations to the Clerk of this Court as Registrar for payment pursuant to the Plan of Composition, and objects to any time limit for such presentation becoming a part of the Final Decree, and objects to that part of the Final Decree which would bar from participating in the Plan of Composition if not presented within a period of twelve months, or any period of time.

2. Objects to that part of the proposed Final Decree which provides that holders of outstanding bonds are permanently [21] or otherwise restrained

or enjoined from asserting any claim or demand against the petitioner or property situated therein or the owners thereof.

Dated: July 9, 1941.

W. COBURN COOK,
Attorney for J. R. Mason, Objecting Creditor.

[Endorsed]: Filed July 10, 1941. [22]

[Title of District Court and Cause.]

FINAL DECREE, DISCHARGE AND ORDER SETTLING REPORT AND ACCOUNT OF DISBURSING AGENT

The petition of Merced Irrigation District for Final Decree, Discharge and Order Settling Report and Account of Disbursing Agent came on duly and regularly to be heard on Friday the 11th day of July, 1941, at the hour of 10 o'clock A.M. in accordance with Order heretofore duly made herein setting said petition for hearing and it appearing that due and proper notice has been given in accordance with law and the order of court heretofore made herein of the hearing of said petition, and evidence both oral and documentary having been adduced and all persons interested having been heard in connection with said matter, and it further appearing that each and every, all and singular, the allegations of said petition are true; and it further

appearing that all matters and things set forth in the report and account of E. E. Neel as [23] disbursing agent and which report was filed herein on June 2, 1941, are true and correct and that the said E. E. Neel has faithfully discharged all obligations as disbursing agent;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That the receipts and disbursements by, and all other official acts of, E. E. Neel, as disbursing agent herein, be and the same are hereby approved and confirmed and the duties of said E. E. Neel as disbursing agent are hereby terminated and his liability thereunder is forever discharged.

2. That the sum of $54,506.95 paid to the Clerk of this Court as Registrar herein by said disbursing agent be disbursed by the Registrar for the purpose of taking up and retiring, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of petitioner as are affected by the plan of composition and which may be presented to the Registrar for that purpose within the period of twelve months from the date hereof. That all such obligations so presented and retired forthwith cancelled and returned to petitioner by the Registrar. That all such outstanding old obligations of petitioner which are not so presented to the Registrar within twelve months from the date hereof shall be forever barred from participating in the plan of composition or in the funds held by said Clerk as Registrar. That upon

the expiration of the period of twelve months from the date hereof the Clerk of this Court shall forthwith turn over to petitioner, Merced Irrigation District, Merced, California, the balance, if any, then remaining in the Registry of the Court after deducting all lawful charges of said clerk. That said balance, if any, shall be used by petitioner in the payment of its new refinancing bonds called "Second Refunding Issue" hereafter referred to or the interest thereon. [24]

3. That except as provided in paragraph 2 hereof, all the old bonds and other obligations of petitioner affected by the plan of composition approved herein whether heretofore surrendered and cancelled or remaining outstanding and by whomsoever held are hereby cancelled and annulled. That the holders of said bonds be and they are hereby permanently and forever restrained and enjoined from asserting any claim or demand whatsoever thereon as against petitioner district or its officers or against the property situated therein or the owners thereof.

4. That the new or Refunding Bonds of said district called "Second Refunding Issue" in the sum of $7,000,000.00 issued to effectuate the plan of composition approved in this cause, shall not in any way be adversely affected by these proceedings or by any order, judgment or decree made or entered herein.

5. That petitioner has made available within the time and manner prescribed by the interlocutory decree herein all money and consideration to be de-

livered to creditors under the plan of composition approved in said interlocutory decree and in full compliance with said interlocutory decree and Chapter IX of the Bankruptcy Act. That all acts and proceedings required to be taken by petitioner under the terms of the plan of composition approved in this cause and the interlocutory decree have been duly and regularly had and taken and petitioner has duly and regularly complied with all requirements of Chapter IX of the Bankruptcy Act of the United States and with all orders of the court pertaining to it herein. That said plan of composition is binding upon all creditors affected by it whether secured or unsecured and whether or not their claims have been filed or evidenced and if filed or evidenced whether or not allowed, including creditors who have not, as well [25] as those who have, accepted it.

Petitioner, Merced Irrigation District, is hereby discharged from all debts and liabilities dealt with in the plan of compositon approved in the interlocutory decree herein.

Dated: This .... day of ...., 1941.

....

Judge.

[Endorsed]: Filed Feb. 25, 1947. [26]

[Title of District Court and Cause.]

FINAL DECREE, DISCHARGE AND ORDER SETTLING REPORT AND ACCOUNT OF DISBURSING AGENT

The petition of Merced Irrigation District for Final Decree, Discharge and Order Settling Report and Account of Disbursing Agent came on duly and regularly to be heard on Friday the 11th day of July, 1941, at the hour of 10 o'clock A.M. in accordance with Order heretofore duly made herein setting said petition for hearing and it appearing that due and proper notice has been given in accordance with law and the order of court heretofore made herein of the hearing of said petition, and evidence both oral and documentary having been adduced and all persons interested having been heard in connection with said matter, and it further appearing that each and every, all and singular, the allegations of said petition are true; and it further appearing that all matters and things set forth in the report and account of E. E. Neel as [27] disbursing agent and which report was filed herein on June 2, 1941, are true and correct and that the said E. E. Neel has faithfully discharged all obligations as disbursing agent;

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That the receipts and disbursements by, and all other official acts of, E. E. Neel, as disbursing agent herein, be and the same are hereby approved

and confirmed and the duties of said E. E. Neel as disbursing agent are hereby terminated and his liability thereunder is forever discharged.

2. That the sum of $54,506.95 paid to the Clerk of this Court as Registrar herein by said disbursing agent be disbursed by the Registrar for the purposes of taking up and retiring, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of petitioner as are affected by the plan of composition and which may be presented to the Registrar for that purpose. One year after date of entry of this decree and annually thereafter until otherwise ordered by the Court, Merced Irrigation District shall submit herein a report showing the obligations affected by the plan of composition which have been taken up at the composition rate during such year and the Registrar shall likewise, at least once a year, submit a similar report of bonds taken up and the balance, if any, of money remaining in his hands. If any money shall remain in the hands of the Registrar after petitioner claims that the Statute of Limitations applicable to its still outstanding obligations, if any, has run, petitioner may so report to this Court for such further action respecting said money remaining in the hands of the Registrar as this Court may determine to be proper and for the final closing of this proceeding. [28]

3. That except as provided in paragraph 2 hereof, all the old bonds and other obligations of petitioner affected by the plan of composition approved

herein whether heretofore surrendered and cancelled or remaining outstanding and by whomsoever held are hereby cancelled and annulled. That the holders of said bonds be and they are hereby permanently and forever restrained and enjoined from asserting any claim or demand whatsoever thereon as against petitioner district or its officers or against the property situated therein or the owners thereof.

4. That the new or Refunding Bonds of said district called "Second Refunding Issue" in the sum of $7,000,000.00 issued to effectuate the plan of composition approved in this cause, shall not in any way be adversely affected by these proceedings or by any order, judgment or decree made or entered herein.

5. That petitioner has made available within the time and manner prescribed by the interlocutory decree herein all money and consideration to be delivered to creditors under the plan of composition approved in said interlocutory decree and in full compliance with said interlocutory decree and Chapter IX of the Bankruptcy Act. That all acts and proceedings required to be taken by petitioner under the terms of the plan of composition approved in this cause and the interlocutory decree have been duly and regularly had and taken and petitioner has duly and regularly complied with all requirements of Chapter IX of the Bankruptcy Act of the United States and with all orders of the court pertaining to it herein. That said plan of composition is binding upon all creditors affected by it whether secured or unsecured and whether or not

their claims have been filed or evidenced and if filed or evidenced whether or not allowed, including creditors who have not, as well [29] as those who have, accepted it.

Petitioner, Merced Irrigation District, is hereby discharged from all debts and liabilities dealt with in the plan of composition approved in the interlocutory decree herein.

Dated: This 15th day of July, 1941, at 3:40 p.m.

/s/ PAUL J. McCORMICK,
Judge. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that J. R. Mason, creditor of Merced Irrigation District, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Decree, Discharge and Order Settling Report and Account of Disbursing Agent entered in this cause on July 15th, 1941, and from the whole thereof.

Dated: August 22, 1941.

/s/ PETER TUM SUDEN.

Mailed copy to Attorneys for Debtor 8/23/41.
E. L. S. [32]

[Endorsed]: Filed Aug. 23, 1941. [33].

[Title of District Court and Cause.]

PETITION OF MERCED IRRIGATION DISTRICT

To the Honorable, the United States District Court, in and for the Southern District of California, Northern Division:

The petition of Merced Irrigation District respectfully shows:

I.

That heretofore, to-wit, on June 17, 1938, petition was filed by petitioner herein praying that an interlocutory decree be entered herein approving the plan of composition set forth in said petition under the provisions of the Bankruptcy Act of the United States relating to the composition of indebtedness of local taxing agencies (now designated as Chapter IX of the Bankruptcy Act of the United [34] States).

II.

That heretofore, to-wit, on the 21st day of February, 1939, after proceedings to that end duly had and taken, an interlocutory decree was duly made and entered herein confirming the plan of composition set forth in said petition, which said decree became final on the 10th day of February, 1941.

III.

That heretofore in accordance with said interlocutory decree, petitioner duly made available within

the time and in the manner set forth in said decree the sums necessary to be paid on outstanding bonds and coupons of said district pursuant to said decree and the plan of composition therein set forth, and that due notice to holders of outstanding bonds and coupons of petitioner was given for the time and in the manner and as directed by said interlocutory decree and in accordance with law.

IV.

That pursuant to said interlocutory decree, all bonds and coupons presented were duly taken up and discharged at the composition rate specified in said decree by E. E. Neel as disbursing agent under said decree for the period provided in said decree. That thereafter on June 2, 1941, as provided in said decree said disbursing agent did duly make and file herein a full and complete report giving an itemized statement of all receipts and disbursements made by him and including a list of old bonds and coupons still outstanding at the time of said report and not taken up and discharged. That said report showed an unexpended balance in the disbursing agent's hands of Fifty-four Thousand Five Hundred Six and 95/100 Dollars ($54,506.95) as the aggregate amount required to retire at the composition rate old bonds still outstanding plus [35] missing coupons. That said sum of Fifty-four Thousand Five Hundred Six and 95/100 Dollars ($54,506.95) was paid by said disbursing agent to the Clerk of this Court as Registrar contemporaneously with the filing of said account and report pursuant to

said interlocutory decree and that thereafter and after proceedings to that end duly had and taken on July 15, 1941, final decree, discharge and order settling report and account of disbursing agent were duly made and entered herein. That said final decree became final on the 9th day of November, 1942. That in and by said final decree it is provided as follows:

> "2. That the sum of $54,506.95 paid to the Clerk of this Court as Registrar herein by said disbursing agent be disbursed by the Registrar for the purpose of taking up and retiring, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of petitioner as are affected by the plan of composition and which may be presented to the Registrar for that purpose. One year after date of entry of this decree and annually thereafter until otherwise ordered by the Court, Merced Irrigation District shall submit herein a report showing the obligations affected by the plan of composition which have been taken up at the composition rate during such year and the Registrar shall likewise, at least once a year, submit a similar report of bonds taken up and the balance, if any, of money remaining in his hands. If any money shall remain in the hands of the Registrar after petitioner claims that the Statute of Limitations applicable to its still outstanding obligations, if any, has run, petitioner may so report to this Court for such further action respecting

said money remaining in the hands of the Registrar as this Court may determine to be proper and for the final closing of this proceeding."

V.

That more than five (5) years have now elapsed since entry of said final decree and there still remains in the hands of the Clerk of this Court as Registrar the sum of Thirty-two Thousand Eight Hundred Eleven and 59/100 Dollars ($32,811.59) representing the unexpended balance of Fifty-four Thousand Five Hundred Six and 95/100 Dollars ($54,506.95) heretofore deposited, and that said unexpended balance represents the amount due under the [36] plan of composition on bonds and coupons which have not been presented to the Registrar.

Attached hereto and marked Exhibit "A" is a copy of the report of said Registrar last rendered, which report is dated July 15, 1946, and which shows the balance unexpended as hereinbefore set forth.

Attached hereto and marked Exhibit "B" is a copy of Report of Merced Irrigation District on Bonds Received from Registrar taken up under the composition plan dated July 23, 1946.

Attached hereto and marked Exhibit "C" is a statement showing the list of outstanding bonds and coupons of said Merced Irrigation District which have never been presented under said plan of composition.

VI.

That the funds to take up the bonds and coupons referred to in Exhibit "C" at the composition rate aforesaid have now been on deposit with the Registrar for over five (5) years. That said bonds and coupons listed in Exhibit "C" are barred by the statute of limitations and that pursuant to the provisions of the final decree above quoted, petitioner so reports to this Court. That all acts and proceedings required by petitioner have been duly and regularly taken and that the unexpended funds in the hands of the Registrar should now be returned to Petitioner and this proceeding finally terminated.

Wherefore, petitioner prays that the unexpended funds in the hands of the Registrar, to-wit, Thirty-two Thousand Eight Hundred Eleven and 59/100 Dollars ($32,811.59), be paid by said Registrar to petitioner and this proceeding finally terminated and closed.

Dated: July 24, 1946.

/s/ STEPHEN W. DOWNEY,
DOWNEY, BRAND & SEYMOUR,
Attorneys for Petitioner. [37]

State of California,
County of Merced—ss.

H. P. Sargent, being first duly sworn, on oath deposes and says:

That he is an officer, to-wit, Secretary of Merced Irrigation District, the petitioner in the within

entitled proceeding and that he has read the foregoing and annexed petition and knows the contents thereof, and that the same is true of his own knowedge except as to such matters as are therein stated upon his information or belief, and as to those matters, that he believes it to be true.

That he makes this verification for and on behalf of said district and as such officer thereof.

/s/ H. P. SARGENT.

Subscribed and sworn to before me this 23rd day of July, 1946.

[Notarial Seal]

/s/ AURORA KREBS,

Notary Public in and for the County of Merced, State of California. [38]

EXHIBIT "A"

Report of Registrar Pursuant to Final Decree
July 15, 1946

In re Merced Irrigation District
No. 4818-ND in Bankruptcy

Bond No.	Cps. No.	Payee	Amount
7743	21-27	Charles S. Chandler	$515.01

Total	$515.01
Balance in Registry of Court 3/1/46	$33,326.60
Less Payment listed above 3/1/46	515.01
Balance on hand in Registry of Court	$32,811.59

Dated: July 15, 1946.

EDMUND L. SMITH,
Registrar.

Filed July 22, 1946.

EDMUND L. SMITH,
Clerk,
By I. L. MACBETH,
Deputy Clerk. [39]

EXHIBIT "B"

In the District Court of the United States for the Southern District of California Northern Division

No. 4818 in Bankruptcy

In Proceedings for Confirmation of a Plan of Composition of Bond Indebtedness

In the Matter of

MERCED IRRIGATION DISTRICT,
Debtor.

REPORT OF MERCED IRRIGATION DISTRICT ON BONDS RECEIVED FROM REGISTRAR TAKEN UP UNDER THE COMPOSITION PLAN.

Pursuant to the terms and conditions of the final decree entered by this Court in the above entitled matter on the 15th day of July, 1941, the Merced

Irrigation District does, in accordance therewith, file this report, showing the total number of outstanding old obligations received from the Registrar of this Court for the period July 15, 1945, to July 15, 1946, and as hereafter listed which have been cancelled.

Balance held by Registrar of the Court July 15, 1945, to pay outstanding bonds and coupons per "Exhibit B"		$33,326.60
Bond No. 7743, Cps. No. 21-27	$515.01	515.01
Balance in Registry of Court		$32,811.59

Dated this 23rd day of July, 1946.

MERCED IRRIGATION DISTRICT,
By /s/ H. P. SARGENT,
Secretary. [40]

EXHIBIT "C"

List of Outstanding and Unpaid Merced Irrigation District Bonds as of July 15, 1946

Bond Number	Date of Issue	Maturity	Par Value	Owner as Shown on Records of District	Address
230	1/1/22	1935	$ 1,000	H. K. Busche	335 Adeline St., Oakland, Calif.
314	1/1/22	1936	1,000	H. K. Busche	335 Adeline St., Oakland, Calif.
725	1/1/22	1941	1,000	J. R. Mason	1920 Lake St., San Francisco, Calif.
736	1/1/22	1941	1,000	J. R. Mason	1920 Lake St., San Francisco, Calif.
3026 to 3030, incl.	1/1/22	1950	5,000	F. C. Busche	335 Adeline St., Oakland, Calif.
3888 to 3891, incl.	1/1/22	1952	4,000	J. R. Mason	1920 Lake St., San Francisco, Calif.
3898	1/1/22	1952	1,000	J. R. Mason	1920 Lake St., San Francisco, Calif.
4219	1/1/22	1952	1,000	F. C. Busche	335 Adeline St., Oakland, Calif.
4998 to 4999, incl.	1/1/22	1953	2,000	F. C. Busche	335 Adeline St., Oakland, Calif.
5612 to 5621, incl.	1/1/22	1954	10,000	F. C. Busche	335 Adeline St., Oakland, Calif.
7106 to 7110, incl.	1/1/22	1956	5,000	H. K. Busche	335 Adeline St., Oakland, Calif.
9159 to 9161, incl.	1/1/22	1959	3,000	J. R. Mason	1920 Lake St., San Francisco, Calif.

Bond Number	Date of Issue	Maturity	Par Value	Owner as Shown on Records of District	Address
10860 to 10866, incl.	1/1/22	1961	7,000	J. R. Mason	1920 Lake St., San Francisco, Calif.
11281 to 11283, incl.	1/1/22	1962	3,000	F. C. Busche	335 Adeline St., Oakland, Calif.
11297	1/1/22	1962	1,000	F. C. Busche	335 Adeline St., Oakland, Calif.
11387 to 11389, incl.	1/1/22	1962	3,000	F. C. Busche	335 Adeline St., Oakland, Calif.
11843 to 11844, incl.	1/1/22	1962	2,000	F. C. Busche	335 Adeline St., Oakland, Calif.
11847 to 11849, incl.	1/1/22	1962	3,000	F. C. Busche	335 Adeline St., Oakland, Calif.
12088	1/1/22	1962	1,000	F. C. Busche	335 Adeline St., Oakland, Calif.
12125 to 12126, incl.	1/1/22	1962	2,000	F. C. Busche	335 Adeline St., Oakland, Calif.
B93	5/1/24	1940	1,000	J. R. Mason	1920 Lake St., San Francisco, Calif.
B95	5/1/24	1940	1,000	Ownership Unknown	
B272 to B275, incl.	5/1/24	1942	4,000	H. K. Busche	335 Adeline St., Oakland, Calif.
Total			$63,000		

Statement of Missing Coupon Deductions Made by Reconstruction Finance Corporation from Purchase Price of Merced Irrigation District Bond Purchases and Deduction Made from Payment by Disbursing Agent.

Missing Coupons

Bond No.	Coupon No.	Date of Maturity	Principal Amount	Amount Deducted
4362	41	7/1/42	$27.50	$27.50
4443	23	7/1/33	27.50	12.31
4444	23	7/1/33	27.50	12.32
4445	23	7/1/33	27.50	12.32
4725	31	7/1/37	27.50	27.50
7211	41	7/1/42	30.00	30.00
7975	23	7/1/33	30.00	13.43
7976	23	7/1/33	30.00	13.43
8032	23	7/1/33	30.00	13.43
8554	41	7/1/42	30.00	30.00
10316	46	7/1/45	30.00	30.00
11264	24	1/1/34	30.00	13.43
B1906	21	7/1/34	30.00	13.43
	22	1/1/35	30.00	30.00
B1907	21	7/1/34	30.00	13.43
	22	1/1/35	30.00	30.00
B1908	21	7/1/34	30.00	13.43
	22	1/1/35	30.00	30.00
	Total			$365.96

[Endorsed]: Filed July 30, 1946. [42]

[Title of District Court and Cause.]

ORDER

It Appearing that Merced Irrigation District has filed in the above entitled Court a petition

praying that all unexpended funds, deposited with said Court for the redemption at the composition rate of all outstanding bonds and coupons, be now refunded to the said District and that the above entitled proceeding be finally terminated and closed; and

It Further Appearing that there is unexpended and now remains in said fund the sum of Thirty-two Thousand Eight Hundred Eleven and 59/100 Dollars ($32,811.59);

It Is, Therefore, Ordered that hearing on said petition shall be held at ten o'clock, a. m., on the 29 day of October, 1946, before the undersigned, Judge of said Court. [43]

It Is Further Ordered that the Clerk of this Court sign the attached notice of said hearing, and that a copy of said notice shall thereupon be sent by registered mail to each person, shown in Exhibit "C" of said petition as the owner of any outstanding bond or bonds as shown on the records of the District, addressed to the address indicated for said person thereon, and also to any and all attorneys of record for said persons in this proceeding.

It Is Further Ordered That said notice shall be published in the following publications for two (2) successive issues thereof: Merced Sun Star; Wall Street Journal, Pacific Coast Edition.

It Is Ordered that said publication and mailing of notices shall be made by and at the expense of Merced Irrigation District.

Dated: August 20, 1946.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Aug. 20, 1946. [44]

[Title of District Court and Cause.]

NOTICE OF HEARING OF PETITION OF MERCED IRRIGATION DISTRICT PRAYING THAT ALL UNEXPENDED FUNDS DEPOSITED WITH THE ABOVE COURT FOR REDEMPTION OF OUTSTANDING BONDS AND COUPONS BE REFUNDED TO SAID DISTRICT AND THAT THE ABOVE PROCEEDING BE FINALLY TERMINATED.

To the Holders of All Outstanding Bonds and Coupons of Merced Irrigation District Affected by the Plan of Composition Heretofore Approved by This Court:

Notice Is Hereby Given that Merced Irrigation District has filed in the above proceeding a petition praying that all unexpended funds heretofore deposited with said Court for the redemption at the composition rate of all outstanding bonds and coupons be now refunded to the said District and that the above entitled proceeding be finally terminated and closed.

Notice Is Further Given that the 29th day of

October, [45] 1946, at 10 o'clock, a. m., of said day and the courtroom of the above Court, before the Honorable Paul J. McCormick, Judge thereof, in the City of Los Angeles, State of California, have been fixed as the time and place for the hearing of said petition when and where any person interested may appear and be heard with respect thereto.

Dated: August 20th, 1946.

/s/ EDMUND L. SMITH,
Clerk. [46]

[Title of District Court and Cause.]

OBJECTIONS OF J. R. MASON (A CREDITOR) TO THE PETITION

To the Honorable, the United States District Court, in and for the Southern District of California, Northern Division:

J. R. Mason as a holder of certain bonded indebtedness of the Merced Irrigation District, and whose claim was duly filed in this proceeding, respectfully shows on his behalf, and on behalf of other creditors similarly interested:

I.

That the instant Petition, dated July 24, 1946, presents and gives rise to a distinct and separate cause of action ruled by State law, and which should have been addressed to a Court of California.

Ferris v. Prudence Realization Corp., 292 N. Y. 210, 54 N. E. 2d 367;

In re Prudence Bonds Corp., 57 F. Supp. 839;

Cobleigh v. State Land Board, 9 N. W. 2d 665;

Leco v. Crummer & Co., 128 F. 2nd 110;

Ware v. Crummer & Co., 128 F. 2d 114;

Seymour v. Wildgen, 137 F. 2d 160;

Green v. City of Stuart, 135 F. 2nd 33;

Spellings v. Dewey, 122 F 2nd 652. **[47]**

II.

The Petition fails to cite any statute, federal or state, or decision in support of the claim that "the State of Limitations applicable to its still outstanding bonds obligations" has run, and that claim is directly counter to the clear and unequivocal ruling by the Supreme Court of the State of California, in Moody v. Provident Irr. Dist., 12 Cal. 2d 389, where the Court said:

> "That the statute of limitations, under the circumstances disclosed by this case, could never be pleaded by the district until it had the money in its possession to pay the bonds belonging to plaintiffs, and had given notice, is supported by the case of Freehill v. Chamberlain, 65 Cal. 603."

See also, County of Lincoln v. Luning, 130 U. S. 529.

The bonds held by J. R. Mason do not even become lawfully due until 1961, and as to those bonds and coupons not lawfully due, no statute of limitations could apply by virtue of any statute known to this petitioner. All due bonds and coupons have been duly presented with demand for payment in accordance with the provisions in Sec. 52 (Stats. 1919, p. 667) of the Irrigation District Laws, which brings the claims that are past due within the rule laid down by the highest California Court, above quoted.

III.

Altho no claim is made that there is any statute of limitations applicable to the funds with the Registrar of the Court in this cause, and "To effect a forfeiture, which the law does not favor, the evidence must be clear and convincing and must not call upon a court of equity to do an inequitable thing" (Hendrix v. Altman Lbr. Co., 145 F. 2d 501, CCA 5), it is submitted that the Congress in Sec. 204 of the Chandler Act (11 U.S.C.A. § 604) did empower its Courts to "fix a time, to expire not sooner than 5 years after the final decree . . . within which . . . holders . . . shall present or surrender their securities." The complete omission of any such provision from the Statute upon which this proceeding is based (11 U.S.C.A. § 401-404, P.L. 481, Ch. 532, Stat. Sec. 13, as amended June 30, 1946) indicates that the Congress believed that the State law and decisions should be given full respect. [48]

The rules applying to the escheat of funds placed with the registrar of a Federal Court of Bankruptcy to pay minority creditors are reviewed at some length in

> Louisville & R.R. Co. v. Robbins, 135 F. 2d 704, CCA 5; In re Peyton Realty Co., 148 F. 2nd 771, CCA 3.

The instant petition makes no claim that there is any statute applicable to the funds on deposit with the Registrar, but only that there is some (unshown) "Statute of Limitations applicable to its still outstanding obligations."

The Supreme Court of California in Raisch v. Myers, 27 A. C. 27, at page 793 has ruled that California District bonds, even when outlawed by statute, are not as against the real property owner outlawed with regard to the proceeds of sale on foreclosure of a plaintiff's superior lien.

Also see Siwell & Co. v. County of Los Angeles, 160 Pac. 2d 789, affirmed in 27 Cal. (2d) 724 after a Rehearing.

IV.

It is further prayed that the restraint embodied in the decree of this Court "from asserting any claim or demand whatsoever thereon as against petitioner district . . ." be stricken from the decree, because this restraint is in legal and practical effect "An injunction restraining the collection of taxes in a state court—a stay not being authorized by any

law relating to Bankruptcy . . ." (Brick v. McColgan, 39 F. Supp. 358), and also because it is explicitly prohibited by sub (c) of 11 U.S.C.A. § 403; U.S.C. 28, § 41(1), sub (3); 11 U.S.C.A. § 1, secs. 14, 15. A restraining order can not validly be invoked to allow State or local public tax collecting officers or agencies "to do that which they are not authorized to do by the laws of the State."

U. S. v. Clark Co., 95 U. S. 769;

Huddleston v. Dwyer, 322 U. S. 232.

Merced Irrigation District is a creature of statute, which is a grant of power which the officers and creditors must both look entirely to for their authority and rights.

Meyerfeld v. San Joaquin I. D., 3 Calif. 2d 409. [49]

"Court which renders a final decree for a permanent injunction may open or modify decree where . . . conditions . . . make it just and equitable to do so."

Federal Land Bank v. Glendenning, 61 N. E. 2d 184;

Bekins v. Compton Delevan I. D., 150 F. 2d 526, CCA 9;

Hamaker v. Heffron, 148 F. 2d 981, CCA 9.

The Court may take judicial notice of the speculative boom in the price being demanded by taxpayers within Merced Irrigation District for land

titles since the reduction in the annual direct ad valorem land tax which was made possible by the voluntary acceptance by other bondholders of the cash offer for the original bonds made over 10 years ago. It is a novel condition when the holders of valid, binding and unpaid bonds of a State, or its taxing units, are restrained by federal decree from recourse to State Courts to seek an order to compel State tax officials to stop violating the Constitution and laws of the State.

Wherefore, petitioner respectfully submits that the bonds and past due coupons held by him, as listed in his proof of claim, are in no instance and under no law "barred by the Statute of Limitations," and prays that the funds now with the Registrar be not given to the Bankrupt who has no right to that money, and prays that the restraint referred to in paragraph IV be stricken from the decree, and that this Honorable Court leave to the Courts of California the matter of fixing the rights of the parties involved, and that the proceeding brought under 11 USCA 401-403 be terminated.

Dated: October 26, 1946.

/s/ J. R. MASON,

A Creditor, in Pro Se. [50]

United States of America,
Southern District of California,
Central Division—ss.

J. R. Mason being by me first duly sworn, deposes and says: that he is the objector in the above entitled action; that he has read the foregoing Objections and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ J. R. MASON.

Subscribed and sworn to before me this 26th day of October, 1946.

[Seal] /s/ ROSCOE R. HESS,
Notary Public in and for the County of Los Angeles, State of California. [51]

[Affidavit of service by mail attached.]

AFFIDAVIT OF PUBLICATION

In the District Court of the United States
for the Southern District of California
Northern Division

In Bankruptcy No. 4818

In Proceedings for Confirmation of a Plan of Composition of Bond Indebtedness

In the Matter of

MERCED IRRIGATION DISTRICT,
Debtor.

Notice of Hearing of Petition of Merced Irrigation District Praying That All Unexpended Funds Deposited with the Above Court for Redemption of Outstanding Bonds and Coupons Be Refunded to Said District and That the Above Proceeding Be Finally Terminated

To the Holders of All Outstanding Bonds and Coupons of Merced Irrigation District Affected by the Plan of Composition Heretofore Approved by This Court:

Notice Is Hereby Given that Merced Irrigation District has filed in the above proceeding a petition praying that all unexpended funds heretofore deposited with said Court for the redemption at the composition rate of all outstanding bonds and coupons be now refunded to the said District and that the above entitled proceeding be finally terminated and closed.

Notice Is Further Given that the 29th day of October, 1946, at 10:00 o'clock a.m. of said day and the courtroom of the above Court, before the Honorable Paul J. McCormick, Judge thereof, in the City of Los Angeles, State of California, have been fixed as the time and place for the hearing of said petition when and where any person interested may appear and be heard with respect thereto.

Dated: August 20, 1946.

EDMUND L. SMITH,
Clerk of the United States
District Court.

Legal 222, Sept. 26, 27; Oct. 2, 3, '46.

State of California,
County of Merced—ss.

Dean S. Lesher being duly sworn, deposes and says: That he is now, and at all times herein mentioned, has been, a resident of the City of Merced, Merced County, State of California, a citizen of the United States and State of California, over the age of 21 years, and in no way or manner interested in the subject of the annexed notice; that he is now, and at all times herein mentioned has been Publisher of the Merced Sun-Star; that said Merced Sun-Star is, and at all times herein mentioned was,

a daily newspaper of general circulation, printed and published at the City of Merced, Merced County, State of California; and that the said newspaper is now, and at all times herein mentioned has been, printed and published upon each and every afternoon, except Sundays and certain legal holidays.

That the Notice a copy of which is attached upon the left hand side of this page opposite to this affidavit, was printed and published in said newspaper and in every issue thereof from and including the 26th day of September, 1946, to and including the 3rd days of October, 1946, that is to say, said notice was published in the issues of said newspaper on the following dates:

In the issue of September 26, 1946;

In the issue of September 27, 1946;

In the issue of October 2, 1946;

In the issue of October 3, 1946.

/s/ DEAN S. LESHER.

Subscribed and sworn to before me, this 4th day of October, 1946.

/s/ JULIA CLUTANTE,
Notary Public in and for Merced County, State of California.

[Endorsed]: Filed Oct. 29, 1946. [53]

[Affidavit of publication of the Wall Street Journal attached.]

[Endorsed]: Filed Oct. 29, 1946. [54]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 29, 1946. [55]

At a stated term, to-wit: The October Term, A.D. 1946, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 29th day of October in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Paul J. McCormick,
District Judge.

No. 4818-Bkcy

In the Matter of

MERCED IRRIGATION DISTRICT.

This matter coming on for hearing on petition of Merced Irrigation District for disbursement of funds, filed July 30, 1946, pursuant to notice of hearing filed August 20, 1946, and objections of J. R. Mason to said petition, filed October 28, 1946;

Stephen W. Downey and John Downey, Esqs., appearing for the Petitioner; J. R. Mason, a creditor, appearing in propria persona:

Attorney John Downey presents petition and argues in support thereof.

E. E. Neel is called, sworn, and testifies on examination by Attorney Downey.

Petitioner's Exhibits A, B, and C are admitted into evidence.

The witness leaves the stand to make certain calculations and Attorney John Downey argues further re the statute of limitations.

E. E. Neel resumes the stand and testifies further, and is withdrawn to make further calculations.

Attorney John Downey argues further. Attorney John Downey and Mr. Mason discuss a certain proposed stipulation re notice of the interlocutory and final decrees herein and of the deposit of the funds in the Registry of the Court, as reflected by the Court Reporter's notes.

E. E. Neel resumes the stand and testifies further.

Mr. Mason argues in opposition to the petition, and the Court discusses certain matters with Mr. Mason. The Court propounds a question to Mr. Mason as to whether he is willing to accept his money on the same parity as the other bondholders. Mr. Mason asks for 15 days' time to answer and the Court orders this matter continued to November 15, 1946, at 10 a.m., for further proceedings on this phase of the matter. [58]

Letterhead of Downey, Brand & Seymour

November 12, 1946

Honorable Paul J. McCormick
United States District Judge
Post Office Buiding
Los Angeles 12, California

Re: Merced Irrigation District
in Bankruptcy No. 4818

Dear Judge McCormick:

The hearing on the petition of Merced Irrigation District for refund of unexpended moneys in the above entitled matter will be further heard on November 15. It is our position that the court is now without jurisdiction to allow Mr. Mason to take the money is he now desires to do so. If the statute of limitations has run as we contend, the court would seem to have no jurisdiction except to order the money returned to the Irrigation District. General equity authority would not seem sufficient to override a substantive rule of law. Once an appropriate statute of limitations has run the obligation to pay the money (if any exists) is extinguished.

It is true that in the final decree the court said in effect that upon the expiration of the statute of limitations period the District might report back to the court for such action as the court deemed advisable. However, we do not make our case upon that order but upon statutory and substantive rules of law by virtue of which we claim that the court

cannot exercise discretion in the premises but can only apply the law as it exists. Moreover, the [66] position taken by Mr. Mason does not entitle him to the benefit of the equitable powers of the court even if such power now exists.

Regardless of whether Mr. Mason desires to surrender his bonds and accept the money or not, we respectfully request that at the hearing on November 15 we be permitted to answer Mr. Mason and argue the proposition presented in this letter.

Very truly yours,

DOWNEY, BRAND & SEYMOUR,

By /s/ JOHN F. DOWNEY.

JFD:F

cc to Mr. J. R. Mason
1920 Lake Street
San Francisco, California. [67]

At a stated term, to-wit: The October Term, A. D. 1946, of the District Court of the United States of America, for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 15th day of November in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Paul J. McCormick,
District Judge.

No. 4818-Bkcy

In the Matter of

MERCED IRRIGATION DISTRICT,
Debtor.

This matter coming on for further hearing on Petition of Merced Irrigation District for disbursement of funds, filed July 30, 1946, pursuant to notice filed August 20, 1946, and on objections of J. R. Mason, filed October 28, 1946, thereto: Messrs Downey, Brand, and Seymour by Stephen M. Downey, Esq., appearing as counsel for the petitioner. J. R. Mason being present in propria persona; on motion of Attorney Downey and with consent of respondent J. R. Mason, it is ordered that the following documents be considered as evidence on this hearing: Interlocutory Decree, and appeal therefrom; Final Decree. and appeal therefrom; Objections of J. R. Mason to final decree; the herein petition; Order for Notice on this petition; Notice of hearing this petition; and Proposed Final Decree and objections thereto.

Attorney Downey and Respondent Mason argue, and it is ordered that the petition herein is denied; that the bonds now held and owned by Respondent Mason be deposited within ten (10) days from date of the Decree made pursuant to this hearing; that they will be deposited in full satisfaction under the

plan adopted and effectuated by this proceeding; at the expiration of 75 days from the date of entry of said decree, the Court will then consider further the disposition of the fund now in its Registry and also will further consider disposition of the bonds deposited in the registry; Decree to be prepared by Attorney Downey within ten (10) days from this date.

[Title of District Court and Cause.]

ORDER

This cause came on to be heard on petition of Merced Irrigation District praying that unexpended funds deposited with this Court for the discharge of outstanding bonds and coupons at the composition rate in accordance with the interlocutory decree herein be refunded to said District and that the proceedings herein be finally terminated.

It Is Ordered that said petition be denied; that the bonds and coupons of J. R. Mason, effected by the plan of composition herein, be deposited by him with this Court within ten (10) days from the date hereof; that said deposited being made [69] and upon this order becoming final the said J. R. Mason shall receive in discharge of bonds and coupons so deposited, from the funds on deposit herein, such amount as is provided by the terms of the plan of composition approved in this matter; that upon this order becoming final this Court will further con-

sider the disposition of the bonds so deposited and of the remainder of the said fund then remaining in its registry.

Dated: November ...., 1946.

....

Judge.

[Endorsed]: Filed Feb. 25, 1947. [70]

[Title of District Court and Cause.]

OBJECTIONS OF RESPONDENT TO ORDER PROPOSED BY PETITIONER

To the Honorable, the United States District Court, in and for the Southern District of California, Northern Division:

Respondent has received from Counsel for Petitioner a copy of the proposed order, which they report was mailed this Honorable Court on Nov. 18, 1946.

Respondent respectfully protests and duly objects to this proposed order, and requests that it be amended by striking everything in it, after the words "It is ordered that said petition be denied."

The Petition here involved prayed for one thing only, which was

> "that the unexpended funds in the hands of the registrar . . . be paid by said registrar to peti-

tioner and this proceeding finally terminated and closed."

Therefore because the prayer of respondent "that the petition be dismissed" prevailed, nothing contained in respondent's "Reply to outline of arguments of petitioner" is applicable, because it [71] provided that "Should this prayer be wholly denied . . .", and it is respondents position that his prayer was not "wholly denied".

That portion of the proposed order objected to above, would be, if sanctioned by this Court, beyond the scope of the instant petition, beyond the scope of the Final Decree which "became final November 9, 1942" as to petitioner, and without warrant of any law known to respondent or cited by petitioner.

A further objection is that it would be discriminatory, in that it singles out respondent and ignores the three other holders of "still outstanding" bonds, and so would violate the rule of equality requisite under law.

Respondent was, for many years, active in the profession of underwriting and distributing the obligations of States, Counties, Cities and Districts, as President of J. R. Mason & Co., San Francisco, and has never yet heard of any law enacted by the Congress or by the Legislature of any State making it unlawful to invest in and to hold any valid, binding and "still outstanding" bonds of a State or of its local units of government, protected by the Constitution.

Because Ch. IX (11 USCA 401-404) the base of this proceeding, is a special statute, explicitly limiting the jurisdiction granted, especially in Sec. 409(c), sub(a); 403(e), sub(6); 403(i); and also because of the limitation upon the jurisdiction allowed the Courts of Bankruptcy in 11 USCA §1, sub(14)(15); 11 USCA §1, §§107, sub.b.205; §§104 sub.a(4); 28 USCA §379; 28 USCA §41(1) sub(3); 40 USCA §258a; R.S. §720; 11 Am. Jur., Conflict of Laws §30, construed in Arkansas Corp. v. Thompson, 312 US 673 and further with respect of the scope of the federal power to execute a judgment against a local unit of government in Huddleson v. Dwyer, 322 US 233 it is respondents contention that this Court should stay its hand, and require the parties to litigate question of purely state law in the Court of California, as was ordered in the case of

Layton v. Thayne, Cir. 10, 144 Fed. 2d 94. (Cert. denied)

Seymour v. Wildgen, Cir. 10, 137 F. 2d 160.

In re Boylan, 65, F. Supp. 105. D.C.Pa. [72]

"The Circuit Court of Appeals will not pass on public policy involved in taxing statutes and will not mitigate the rigors of such statutes on the basis of economic hardship, and taxpayers must address their complaints as to such matters to Congress and not to the Courts."

Holmes and Son v. Comm. Cir.4, 155 Fed. 2d 155.

"An injunction restraining the collection of taxes in a State Court—a stay not being authorized by any law relating to bankruptcy, is prohibited by 265 Judicial Code, §28 USCA §379."

Brick v. McColgan, 39 F. Supp. 358.

"Federal Courts should scupulously confine their own jurisdiction to the precise limits which the Statute conferring jurisdiction has defined."

Hartford Accident Ins. Co., 39 F. Supp. 475.

Petitioner is a statutory trust, a land-tax collector which has been delegated taxing powers and fixed, continuing duties by the Constitution and laws of the sovereign State of California. Its powers and duties have been clearly and unequivocally interpreted and construed in the cases cited in respondents prior briefs, to which cases, the following may now be added:

In re Madera Irr. Dist. 92 Cal. 308;

Wores v. Imperial Irr. Dist. 227 Pac. 181 (Cal. Supreme Ct.);

Anderson Cottonwood ID v. Zinzer, 51 C.A. 2d 587, (Hearing denied by Cal. Supreme Court, June 25, 1942)

Oroville Wyandotte I.D. v. Ford, 47 C.A.2d 531;

Glenn Colusa Irr. Dist. v. Ohrt, 31 C.A.2d 619;

Tulare I.D. v. Shepard, 185 US 1.

Composition proceedings demand the utmost good faith of the debtor. Boas v. Bank of America N.T. & S. Assn, 51 C.A. 2d 592.

All property belonging to a California Irrigation District, including land acquired for unpaid taxes, is made immune from prescription, by the provisions in Civ. Code of Cal. §1007.

When a State Court has ruled on the rights in property of a Trustee (Petitioner is a trustee), the Bankruptcy Court is bound by the State Court decree.

Ohio Oil Co v. Thompson, 120 Fed. 2d 831.

"Where the highest court of a State, in an appropriate action, has decided that taxes were properly assessed, and are legal and valid under the Constitution and laws of the State, a federal court will not entertain a suit to enjoin their collection."

Douglas County v. Stone, 191 US 557.

"It has never been held that charges upon or estates in land created by the owner thereof can avail as against the taxing power of the Commonwealth. Municipal liens for grading and paving streets are a species of taxation and come within the rule. Such liens bind the entire estate in the land, except where an Act of Assembly directs otherwise. If it were not so, the owner of real estate could wholly defeat

the taxing power by charging it with the payment of a sum of money equal to its full value."

City of Erie (Pa.) v. Piece of Land, 14 Atl. 2d 428, 431.

See also,

Day v. Ostergard, 21 Atl.2d 586. (Pa. Sup. Ct.)

Spencer v. Merchant, 125 US 345, 352;

Murray v. Charleston, 96 US 432;

Perry v. City of Los Angeles, 187 Cal. 753;

Heine v. Board of Lev. Comm., 19 Wall (86 US) 665;

State v. Murray, 79 S.C. 330, 60 S.E. 933;

Ex parte Ayers, 123 US 443;

Ex parte Virginia, 100 US 339, 347.

"The levying of State taxes upon the title of private landholders . . . impairs the exercise of no federal function."

Petition of S.R.A. 18 N.W. 2d 442. Minn. Sup. Ct. Affirmed by Supreme Court of U.S. in S.R.A. v. Minnesota, 14 US LW 4269.

"If, however, the officer is merely a nominal defendant, and the State is the real party in interests (as here) then the suit is in substance one against the State and can not be maintained. (Citations) . . . Having held in the instant case that the suit is against (or by)

the State, the jurisdiction of the federal court must fail, even though the State of Arkansas had waived its immunity and consented to be sued." (Emphasis supplied)

Cargile v. N.Y. Trust Co., 67 Fed.2d 585.

"Legislature shall not pass any . . . laws . . . releasing or extinguishing in whole or in part, the indebtedness, liability or obligation of any corporation or person to this State, or to any municipal corporation therein."

California Constitution, Art. IV, §§25, sub. 16.

"The Legislature shall have no power . . . to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation, whatever."

California Constitution, Art. 4, Sec. 31.

"These are not academic debating points or technical niceties. Those who have gone before us have admonished us that in a free representative government nothing is more fundamental than the right of the people . . . and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the State to make and alter their

laws at pleasure is the greatest security for liberty and justice . . .

We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States as declared by their Courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it."

Twining v. New Jersey, 211 US 78, 106.

"Especial respect should be had to such decisions when the dispute arises out of general laws of a State, regulating its exercise of the taxing power, or relating to the State's disposition of its public lands."

Wilson v. Standifer, 184, US 399, 412.

"The necessity for recognizing and maintaining the Nation and each of the State Governments with its full constitutional power and right to function independently of and free from infringements, or burdens of the other can not be minimized or overlooked. When local government atrophies and the National reach grows stronger and more determined, decay begins. The perpetuity of our way rests upon the continuity of the blended, dual system."

First Nat. Bank, Gainesville, Tex. v. Thomas, 38 F. Supp. 849.

"The well settled principle of law is that jurisdiction of subject matter may not be con-

ferred upon a tribunal by consent. Nor can jurisdiction be construed to have been acquired by a Court because of the consent of one of the parties to a submission of litigation to the Court, when in fact and in law, the Court is without power to act. Since the jurisdiction of subject matter can not be conferred by consent, it can less so be acquired by inference . . . The Court not having jurisdiction of the subject matter, can not acquire jurisdiction of the persons. To bind persons, the Court must first obtain jurisdiction of the matter submitted to it."

Vaughan v. Vaughan, 35 NYS 2d 421.

"An Act which is valid on its face, may still, as applied to a particular state of facts, be invalid."

Nashville C.&St.L.Ry Co. v. Walters, 294 US 405.

It is settled that whenever jurisdiction is lacking, a Federal Court must sua sponte dismiss the cause.

Atlas Life Ins. v. Southern, 306 US 563.

"Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of the tax problems, do not alter the limited nature of the function of this Court when State taxes come before it . . .

Nothing can be less helpful than for Courts to go beyond the extremely limited restrictions that the Constitution places upon the States and to inject themselves in a merely negative way into the delicate processes of fiscal policy making."

Wisconsin v. Penney, 311 US 435, 445.

The "still outstanding" bonds impose upon Petioner

". . . a plain official duty, requiring no exercise of discretion" and when "performance is refused, any person who will sustain injury by such refusal may have mandamus to compel its performance."

Board of Liquidation v. McComb, 92 US 531, 541.

"The scrupulous regard for the rightful independence of State governments which should at all times actuate the Federal Courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted Federal right may be preserved without it . . .

If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy and in the State courts from which the

cause may be brought to this Court for review if any federal questions be involved."

Great Lakes Dredge & Dock Co. v. Huffman, 319 US 293.

Land holders may not get injunctions in a Federal Court to stop the enforcement of taxes on agricultural land.

Tuttle v. Bell, 377 Ill. 510, 37 N.E. 2d 180. Certiorari denied 315 US 815.

The rule is stated by Dobie on Federal Procedure, Sec. 16, p. 25;

"Every federal court is a court of limited jurisdiction. All presumptions are against the jurisdiction of such a court, so that the facts disclosing the jurisdiction must affirmatively appear upon the record. Jurisdiction can not be conferred by the mere consent of the parties, and the question of jurisdiction, whether or not raised by the parties, is always, during the progress of the case, before the federal courts, both trial and appellate."

It is submitted that the jurisdiction requisite to order respondent to now surrender the bonds does not "affirmatively appear upon the record", and hence that portion of the order should be stricken, as requested above, herein. [76]

Petitioner, in his letter of Nov. 12, 1946 to this Court, said:

"It is our position that the court is now without jurisdiction to allow Mr. Mason to

> take the money if he now desires to do so . . . It is true that in the final decree the court said in effect that upon expiration of the statute of limitations (applicable to its still outstanding obligations) the District might report back to the court for such action as the court deemed advisable. However we do not make our case upon that order but upon statutory and substantive rules of law by virtue of which we claim that the court can not exercise discretion in the premises but can only apply the law as it exists." (The State law.)

Petitioner failed completely to cite any pertinent "law". or citations. and having failed to even try and question the ruling in Moody v. Provident I. D., 12 Cal. 2d 389 which made the statute wholly inapplicable to any of the bonds involved. and this Court having also announced that petitioner has no equities in the funds now in the registry of this Court. it is respectfully submitted that the petition failed. and that the petition having been denied. it should be dismissed. and the parties should be allowed to address any furthey question or dispute to the California Courts. freed from any injunction by this Honorable Court.

> "The discharge of a bankrupt does not affect securities and they are subject to a judgment or decree in rem. but the creditor applying for such remedy may be required to await the re-

sult of the bankrupt's discharge if the bankrupt or assignee insists upon it."

Omaha US Employees Fed. Credit Union v. Brunson, 23 NW 2d 717.

Wherefore, respondent prays that all the language following "It is ordered that said petition be denied" in the proposed order be stricken, that the restraints in the final decree be lifted, on the ground that they are without warrant of law, and that the proceeding be dismissed. Should this prayer be denied, respondent requests the opportunity to present further argument, orally, before the proposed order is signed.

Dated: November 21, 1946.

/s/ J. R. MASON
a creditor, in Pro Se.

1920 Lake Street.
San Francisco, 21, Calif.

[Endorsed]: Filed Nov. 22, 1946. [77]

At a stated term, to-wit: The September Term, A. D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Saturday, the 14th day of December, in the year

of our Lord, one thousand nine hundred and forty-six.

Present: The Honorable Paul J. McCormick,
District Judge.

No. 4818-Bkcy

In the Matter of

MERCED IRRIGATION DISTRICT,
Debtor.

On the consideration of the proposed order relating to the action of the Court pursuant to proceedings of Nov. 15, 1946, and of the objections of respondent, J. R. Mason, to said proposed order filed herein Nov. 22, 1946, the Court is in doubt because of the statements in the last sentence of the objections of respondent to the order proposed by the petitioner as to the attitude and position of the respondent, J. R. Mason, and therefore, in order to finally and decisively ascertain the attitude of said respondent, J. R. Mason, and in conformity to his request in said objections of respondent to the order proposed by the petitioner, it is now ordered that the said respondent and petitioner Merced Irrigation District appear before this Court in court room No. 8, United States Post Office and Court House, Los Angeles, California, on Saturday, Dec. 28, 1946, at 10 o'clock a. m., for further and final proceedings in the matter of the petition of the Merced Irrigation District filed herein July

30, 1946. The clerk is directed this day to transmit notice hereof by U. S. mail to petitioner Merced Irrigation District and to the respondent J. R. Mason. [78]

United States District Court
Office of the Clerk
Southern District of California
Los Angeles 12, California,

December 14, 1946

Stephen W. Downey, Esq.,
Downey, Brand & Seymour,
Attorneys at Law,
500 Capital National Bank Bldg.,
Sacramento, Calif.

Mr. J. R. Mason, 1920 Lake Street,
San Francisco 21, Calif.

Gentlemen:

RE: In the Matter of
MERCED IRRIGATION DISTRICT
No. 4818 Bkcy. N. D.

The Court has this day ordered that the above case be placed on the Calendar on Dec. 28, 1946, at 10 o'clock a. m., pursuant to order made this day, copy enclosed, and that the attorneys for the parties or you appear before the Honorable Judge Paul J. McCormick for hearing at that time.

/s/ EDMUND L. SMITH,
Clerk. [79]

At a stated term, to-wit: The October Term, A. D. 1946, of the District Court of the United States of America, for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Saturday, the 28th day of December, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Paul J. McCormick,
District Judge.

No. 4818-Bkcy.

In the Matter of
MERCED IRRIGATION DISTRICT,
Debtor.

This matter coming on for further and final proceedings in the matter of the petition of the Merced Irrigation District, filed July 30, 1946, for distribution of unexpended funds in the hands of the Registrar, to petitioner, and for termination and closing of this proceeding; J. R. Mason, a creditor, objector, being present in propria persona; at 10:28 a. m. court convenes herein;

Stephen M. Downey, Esq., counsel for the petitioner, being absent, the Court is informed that Mr. Downey is delayed due to the train on which he is traveling to Los Angeles being late, and thereupon court recesses until Mr. Downey arrives.

At 10:58 a. m. court reconvenes herein and Attorney Downey and J. R. Mason being present, the Court refers to, and reads into the record from the

brief of Mr. Mason dated Nov. 21, 1946, and makes a statement to Mr. Mason. It is ordered to proceed with the argument.

Mr. Mason makes a statement and argues to the Court in opposition to the said petition filed July 30, 1946. At 11:55 a. m. Attorney Downey makes a statement and argues to the Court in support of the said petition and makes a suggestion to the Court as to further order herein. At noon Mr. Mason argues further in reply, and at 12:04 p. m. Attorney Downey argues further.

At 12:05 p. m. the Court makes a further statement and refers to the prior proceedings herein and the record and files in this matter, and gives its decision as follows:

It now appears that the Court misapprehended Mr. Mason's attitude in the premises and it now appears and the Court finds that the respondent Mason is not willing to comply with the suggested direction of the [80] Court as indicated by the record. The Court further concludes that laches have occurred and that there has also been sufficient time under any applicable statute of limitations for the determination of the amount remaining in this fund, the Court concluding that it has jurisdiction over its fund and it is the fund that is in question in this proceeding at this time, and would be inclined to the suggestion of counsel for the District in his desire to afford to those bondholders, including Mr. Mason, the proposed opportunity to share in this money in preference to the Merced Irriga-

tion District, but it must be done on the basis of the Court's direction and not upon any other theory. Apparently that is not satisfactory to Mr. Mason, so that counsel for the District will prepare an order along the lines suggested by him in his argument and present that for signature before December 31, 1946. Exception is allowed and noted for Mr. Mason.

Mr. Mason makes a further statement to the Court. [81]

[Title of District Court and Cause.]

ORDER AND DECREE

After due notice given as required by order of this Court, the Petition of Merced Irrigation District Praying That Unexpended Funds Deposited With This Court for the Discharge of Outstanding Bonds and Coupons at the Composition Rate in Accordance With the Interlocutory Decree Herein Be Refunded to Said District came on regularly to be heard on the 29th day of October, 1946, Stephen W. Downey and John F. Downey appearing for petitioner; J. R. Mason, one of the holders of outstanding bonds and coupons effected by the plan of composition herein, appearing in propria personem; and no other appearances being made by or on behalf of any other interested party or parties; [82]

After proceedings thereon said matter was duly continued to, and further hearing thereon was had, on the 15th day of November, 1946; thereafter, and upon presentation of a proposed order upon said Petition, Objections to said proposed order were

filed by the said J. R. Mason; thereupon a hearing on said objections was regularly set for the 28th day of December, 1946, and after due notice thereof said objections were on said day duly heard and considered.

The Court, having fully considered said Petition and said Objections, and having heard evidence and argument thereon, and being fully advised in the premises, Now Finds:

That notice of hearing on said Petition and of hearing on said Objections was duly and regularly given in accordance with the Orders of this Court;

That all outstanding bonds and coupons of the above named Debtor effected by the plan of composition herein, and all claims of whatsoever nature based thereon, are now barred by the statutes of limitation applicable thereto and do not now constitute valid claims against said Debtor nor against said fund deposited by Debtor with this Court; that the owners and/or holders of said outstanding bonds and/or coupons are guilty of laches in the premises and are barred thereby and by applicable statutes of limitation from receiving any part of said fund on deposit herein and/or from asserting any claim whatsoever against said Debtor based on said bonds and/or coupons.

The Court Further Finds that it is nevertheless vested with equitable power and authority to authorize the owners of said bonds and coupons an additional period of forty-five (45) days from the date hereof within which to deposit said bonds and/or coupons with, and surrender said bonds

and/or coupons to this [83] Court and to thereupon receive from said fund deposited by Debtor herein payment therefor at the composition rate approved in this cause; and

The said Debtor having no objection to such authorization and procedure;

Now, Therefore, It Is Hereby Ordered and Decreed:

That Merced Irrigation District, the Debtor herein, is entitled to have refunded to it all moneys now remaining on deposit with this Court from the fund heretofore deposited herein by said Debtor for the discharge of its obligations in accordance with the interlocutory decree in this cause;

That the refund to said District of said moneys shall however be withheld for a period of forty-five (45) days from the date hereof; that during said period of forty-five (45) days the Clerk of this Court, as Registrar of said fund, shall pay therefrom to the owner or owners of bonds and/or coupons effected by the plan of composition herein who shall deposit said bonds and/or coupons with, and surrender the same to this Court during said forty-five (45) day period such amount as is provided by the terms of the interlocutory decree herein;

That upon the entry of this Order and Decree Merced Irrigation District shall cause true and correct copies thereof to be sent by registered mail to the following named persons at the addresses set opposite their respective names:

J. R. Mason, 1920 Lake Street, San Francisco, California;

H. K. Busche, 335 Adeline Street, Oakland, California;

F. C. Busche, 335 Adeline Street, Oakland, California;

and shall cause additional true and correct copies thereof to be [84] placed in the hands of the United States Marshal for the Northern District of California with instructions that he serve the same on the said H. K. Busche and the said F. C. Busche personally if such personal service thereof can be effected by him;

That upon the expiration of forty-five (45) days from the date hereof, and upon the filing with this Court by Merced Irrigation District of affidavits showing that the matters herein required of it to be done have been done, the Clerk of this Court, as Registrar of the said fund deposited herein by Debtor, shall deliver all moneys then remaining therein to Merced Irrigation District, and said District shall thereupon acquire full title thereto and ownership thereof;

That upon said moneys being so paid to Merced Irrigation District this proceeding shall become and be finally terminated and closed.

Dated: Dec. 31st, 1946.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed, judgment entered and docketed Dec. 31, 1946.

Notation made in Bankruptcy Docket on Dec. 31, 1946, pursuant to Rule 79(a), Civil Rules of Procedure. [85]

[Title of District Court and Cause.]

OBJECTIONS BY RESPONDENT TO ORDER PROPOSED BY PETITIONER

To the Honorable, the United States District Court, in and for the Southern District of California, Northern Division:

Respondent received from Counsel for Petitioner copy of proposed order January 2, 1947, the original of which was mailed to the Court.

Respondent respectfully objects to this proposed order and to the proposed draft thereof in the following respects:

1. To all language that indicates that this Court found that any statute of limitations is applicable to the still outstanding obligations held by Respondent.

2. Objects to the proposed 45 day time limitation, or any other time limitation not allowed by applicable law, or by any provision in the Final Decree of Nov. 9, 1942.

3. Objects to the proposed order to give the money now in registry of this Court to Petitioner, because it never did and does not, and will not belong to Petitioner. [86]

Respondent respectfully submits that Petitioner at no point in the proceeding cited any law or case even pretending to modify the inapplicability of any statute of limitations to the bonds and defaulted coupons held by respondent, as construed and applied by the highest State Court in Moody v. Provident I. D., 12 C. 2d 389.

The proposed order cites no case, or precedent for any contrary ruling with regard to the only question raised in the Petition.

Respondent again respectfully invites the Court's consideration of the arguments and citations in this regard, presented in his briefs of October 26, 1946, November 12, 1946, and Nov. 21, 1946, and the complete silence about it, in briefs of Petitioner.

The proposed decree finding respondent guilty of laches is objected to, because petitioner made no such point at any stage of the proceeding, having instead vigorously contended that "the court can not exercise discretion in the premises but can only apply the law as it exists." (Letter to Court, dated Nov. 12, 1946.)

Petitioner has shown no right, title or interest in or to any of the funds in the Registry of this Court. The Court above, in Bekins v. Compton Delevan I. D., 150 Fed. 2d 526, held squarely that similarly deposited funds are the property of the bond holders, and not at all the property of the bankrupt.

In its Petition to the Supreme Court of the U. S. the Compton Delevan District said: "The Appellate Court states that the money represented in the composition figure which would have been paid to the respondent if their bonds had been presented is really the property of respondent and not of the petitioner; this is an erroneous conclusion." But Certiorari was denied by the Court.

Disbursement of funds in the Registry of the Court in these cases is governed by Title 28 of Judi-

cial Code, Sec. 851, 852, and the proposed order, if signed would clearly appear to be contrary to its explicit provisions. Petitioner has claimed no loss because respondent has not drawn down the money in the Court's Registry. [87]

With regard to whether the Courts are authorized, in proceedings arising under Ch. IX of the Bankruptcy Act, to exercise equitable powers in matters otherwise settled by the laws and decisions of the State and its highest Courts, the rulings in the following cases may prove relevant and helpful to this Court:

> Spellings v. Dewey, 122 Fed. 2d 652;
> Ware v. Crummer & Co., 128 Fed. 2d 114;
> Green v. City of Stuart, 135 F. 2d 33.

In Faitoute v. Asbury Park, 316 U. S. 502, 508, 509, the Court said in answering the contention that the Federal Ch. IX is supreme, said:

> "Can it be that a power that was not recognized until 1938, and when so recognized, was carefully circumscribed to reserve full freedom to the States, has now been completely absorbed by the federal government. . . . We think not."

The late Pres. Roosevelt said in 1937:

> "* * * it was clear to the framers of our Constitution that the greatest possible liberty—of self government—must be given to each state, and that any national administration attempting to make all laws for the whole nation * * *

would inevitably result at some future time in a dissolution of the Union itself." (N. Y. Times, Sept. 17, 1937, page 24.)

In U. S. v. Bekins, 304 U. S. 27, which held Ch. IX "not unconstitutional," the Court stressed the condition embodied in that statute, that a petitioner must be "authorized by law to take all action necessary to be taken by it to carry out the plan," and made it clear that such action must be authorized by State law.

Petitioner having failed to cite the necessary State law, upon which the proposed order could validly rest, and this Court having no summary jurisdiction in a Ch. IX proceeding, respondent prays that the funds in the Registry of this Court be disbursed only as provided by Sec. 851, 852, supra, that the petition filed July 24, 1946, be denied, and the claims be adjudicated by the State Court.

Dated January 2, 1947.

/s/ J. R. MASON,
a Creditor, in Pro Se.,
1920 Lake St.,
San Francisco 21,,
348 W. Calif. St.,
Pasadena 2, Cal.

The foregoing objections are considered and determined to be without merit under applicable and appropriate procedure herein.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Jan. 3, 1947. [88]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that J. R. Mason, one of the creditors of Merced Irrigation District and respondent in this cause, does appeal to the Circuit Court of Appeals of the United States in and for the Ninth Circuit from the Order and Decree entered in this action December 31, 1946, and from the whole thereof, the same being an Order and Decree entered after the Final Decree dated July 15, 1941.

Dated: January 22, 1947.

/s/ J. R. MASON,
In Propria Persona. [89]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, J. R. Mason, Appellant named in the Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, dated Jan. 22, 1947, as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and authorized to transact business in the State of California, as Surety, are held and firmly bound unto Merced Irrigation District, and to the United States of America, and to the Clerk of said Court, in the full and just sum

of Two Hundred Fifty & 00/100 Dollars ($250.00), to be paid to them and/or to each and/or to all or any of them, and his or their respective successors, if any, as their respective rights may appear, in the aggregate amount of $250.00, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of January, 1947.

Whereas the above named principal has or is about to file a notice of appeal and take an appeal in said matter from the order and decree entered December 31, 1946, which decree was entered after Final Decree, in this same cause, dated July 15, 1941, which became final Nov. 9, 1942, to the Circuit Court of Appeals of the United States for the Ninth Circuit and files herewith his said Notice of Appeal.

Now, Therefore, the condition of the above obligation is such, That if the said Principal shall prosecute his said appeal to effect and answer all costs, if he shall fail to make his plea good, then this obligation to be void; otherwise to remain in full force and effect.

It is further stipulated as a part of the foregoing bond, that in case of the breach of any condition thereof, the above named District Court may, upon notice to the Surety, above-named, proceed summarily in said action or suit to ascertain the amount which said Surety is bound to pay on account of

such breach, and render judgment therefor against said surety and award execution therefor.

/s/ J. R. MASON,
AMERICAN SURETY
COMPANY OF NEW YORK,
By: /s/ D. B. Sperry,
Resident Vice-President.

Attest: /s/ M. L. CRUMMEY,
Resident Asst. Secretary.

Bond No. 35-470-095
Premium $10.00 per annum. [90]

State of California,
City and County of San Francisco—ss.

On this 14th day of January, in the year one thousand nine hundred and forty-seven, before me, Jane M. Dougherty, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared B. D. Sperry and M. L. Crummey, known to me to be the Resident Vice-President and Resident Assistant Secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the

said City and County of San Francisco, the day and year in this certificate first above written.

/s/ JANE M. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 24, 1949.

[Endorsed]: Filed Jan. 22, 1947. [91]

[Title of District Court and Cause.]

ORDER

It appearing that an appeal has been taken by J. R. Mason, upon his application a stay of execution of the order by this Court dated Dec. 31, 1946, is hereby granted pending appeal and until forty-five days (45 days) after the coming down of the Final Mandate of the Appellate Court, unless otherwise ordered prior to said time.

Dated: Jan. 22, '47.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Jan. 22, 1947. [92]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The Order and Decree that the claims of J. R. Mason are barred by the Statute of Limitations applicable to the still outstanding obligations of Merced Irrigation District is an error of law.

2. The Court erred in ruling that any of the bonds or coupons owned by J. R. Mason are outlawed, because some are not yet due or lawfully payable, and because those which are past due were all duly presented for payment, and are thus brought under the provisions of Sec. 52 of the Irrigation District Act, and are not subject to the Statute of Limitations otherwise applicable to past due claims.

3. The doctrine of laches is inapplicable in the absence of any showing of injury. No such showing appears, and this part of the Order and Decree entered Dec. 31, 1946, is an error of law.

4. The Final Decree was entered July 15, 1941, and became final Nov. 9, 1942. The Order here involved, was entered Dec. 31, 1946, pursuant to petition filed by the bankrupt July 24, 1946. The instant decree prescribes new provisions with respect to laches, not requested in the petition of July 24, 1946, not authorized by 11 USCA 401-403, or any Federal or State law cited, and is an error of law.

5. Because the bankrupt is not authorized to call, redeem or pay its bonds or coupons before

their fixed due dates, or for less than the sums promised in the bonds and statutes on which they are based, the Order and Decree allowing J. R. Mason and the other holders of "still outstanding obligations" 45 days within which to surrender their valid, binding and unpaid bonds at 50% of bond principle, with nothing for defaulted interest from 1932, or suffer a complete loss and to forever get nothing, is arbitrary, without warrant of law, and it contravenes the explicit limitation in Sec. 403 (e) sub (6) against decrees unless the petitioner "is authorized by law to take all action necessary to be taken by it to carry out the plan."

6. The Court erred in failing to lift the restraints in the Final Decree, as requested, which restraint has the force and effect of permitting Public tax officials of California to violate the Constitution and laws of California applicable under Deerings Gen. Laws, Act 3854, p. 1792, in that it releases them from the performance of mandatory taxing duties, as construed by the highest State Court, and also by the Supreme Court of the U. S. For these reasons the Decree contravenes 28 USC 41 (1), sub (3) (4); 11 USCA 1, Sec. 14, 15; 28 USCA 379; and violates the vested rights of J. R. Mason in the bonds affected by the Decree, which are secured by Art. I, sec. 16; Art. IV, sec. 1, 31; Art. X, sec. 5; Art. XIII, sec. 6 of the California Constitution, and by Art. I, sec. 10, cl.1, and the 5th and 14th Amendments to the U. S. Constitution. [93]

7. The Court erred in ordering the funds originally placed in the registry of the Court to pay "the

holders of such bonds in accordance with said Interlocutory Decree," given to the bankrupt unless withdrawn by the holders of still outstanding bonds within 45 days. No showing was made that the bankrupt has any right, title or interest in or to any of this fund, the disbursement of which is governed by the provisions in Title 28 of the Judicial Code, Sec. 851, 852. No time limitation is provided in these sections of Judicial Code within which lawful claims may be presented and get paid.

8. The District Court, after the Final Decree had become final, is not authorized in proceedings under 11 USCA 401-403 to make any additions to its substantive provisions, and was without jurisdiction to enter the Order and Decree of Dec. 31, 1946, unless the Statute of Limitations applicable to the still outstanding bonds and coupons held by J. R. Mason and others had run, as a matter of law.

9. The Court erred in entering the order, because it has the force and effect of unlawfully giving abatement from mandatory taxation to private holders of land titles, and allowing them to retain the land titles in violation of State law and decisions of the highest State Court, and of the Supreme Court of the U. S. The effect of the decree is to enable tax evading and tax avoiding holders of land to unlawfully reap unearned increment, at the expense of the holders of still outstanding bonds, and with no benefit to the common good.

10. Merced Irrigation District is a political subdivision of the State of California, to which the

State has delegated its sovereign power to lay and enforce direct ad-valorem taxes on the land within its boundaries, without limitation as to rate or time, and whose fiscal affairs, obligations and responsibilities are ruled by California laws, exclusively.

11. J. R. Mason is a holder of valid, binding and unpaid original "still outstanding" bonds and coupons issued by Merced Irrigation District, whose vested rights as a bondholder are governed by State law and decisions, and are secured against impairment by Art. 1, sec. 10, cl.1 and the Fifth and Fourteenth Amendments to the U. S. Constitution.

12. The principle of Constitutional law that the fiscal affairs of a State, and of its taxing instrumentalities, are immune from federal interference was not reversed in U. S. v. Bekins, 304 US 27, or in any other decision by the Supreme Court of the U.S.

/s/ J. R. MASON,
In Propria Persona.

(Affidavit of service by mail attached.)

[Endorsed]: Filed Jan. 22, 1947. [94]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The appellant designates the following as those parts of the record on appeal as necessary for the

consideration of the points upon which the appellant intends to rely in this appeal.

1. Those portions of the record in this cause which were transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals of the Ninth Circuit and printed by said Clerk in the cases of the appeals entitled, "West Coast Life Ins. Co. v. Merced Irr. Dist.", No. 9242, in the U. S. Circuit Court of Appeals of the Ninth Circuit, and also in the case of "J. R. Mason v. Merced Irr. Dist.", No. 9955, in the U. S. Circuit Court of Appeals of the Ninth Circuit.

2. Petition of Merced Irrigation District, dated July 24, 1946.

3. Notice of Hearing, dated Aug. 20, 1946.

4. Communication dated Nov. 12, 1946, to the U. S. District Court, signed by Downey, Brand & Seymour, as counsel for bankrupt.

5. Entry #537 in Minute Book, Vol. 6, of U. S. District Court (No. Div.) of order by the Court on Nov. 15, 1946.

6. Notice of Hearing on Dec. 28, 1946, issued by the Court Dec. 14th.

7. Reporter's Transcript of Proceedings of Nov. 15 and Dec. 28, 1946, (partial).

8. Order and Decree, entered Dec. 31, 1946.

9. Statement of Points on Appeal.

10. Notice of Appeal.

11. Bond for Costs on Appeal.

/s/ J. R. MASON,
In Pro. Se.

[Endorsed]: Filed Jan. 22, 1947. [96]

[Title of District Court and Cause.]

AFFIDAVIT OF COMPLIANCE BY MERCED IRRIGATION DISTRICT WITH REQUIREMENTS OF ORDER AND DECREE

State of California,
County of Sacramento—ss.

John F. Downey, being first duly sworn, deposes and says:

That he is one of the attorneys for Merced Irrigation District, the debtor above named; that Merced Irrigation District has complied with all of the requirements of the Order and Decree of December 31, 1946, herein, as hereinafter set forth.

That on the 2nd day of January, 1947, affiant sent true and correct copies of said Order and Decree by registered mail to the following named persons at the addresses set opposite [97] their respective names:

J. R. Mason, 1920 Lake Street, San Francisco, California.

H. K. Busche, 335 Adeline Street, Oakland, California.

F. C. Busche, 335 Adeline Street, Oakland, California.

That affiant also placed true and correct copies of said Order and Decree in the hands of the United States Marshal for the Northern District of California, with instructions that he serve the same on the said H. K. Busche and the said F. C. Busche personally.

That affiant is advised by said Marshal that said service was made as directed; that affiant is further advised by the Clerk of the above Court that the said Marshal has filed herein a return of service of said Order and Decree stating that a true copy thereof was personally served on H. K. Busche on January 13, 1947, and that a true copy thereof was personally served on F. C. Busche on January 13, 1947.

That Merced Irrigation District has in every way fully performed all of the matters required of it as set forth in said Order and Decree of December 31, 1946.

Dated: January 25, 1947.

/s/ JOHN F. DOWNEY.

Subscribed and sworn to before me this 25th day of January, 1947.

[Seal] RUTH NORRIS,

Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Jan. 30, 1947. [98]

[Title of District Court and Cause.]

ORDER AND DECREE

After due notice given as required by order of this Court, the Petition of Merced Irrigation District praying that unexpended funds deposited with this Court for the discharge of outstanding bonds and coupons at the composition rate in accordance with the Interlocutory Decree herein be refunded to said District came on regularly to be heard on the 29th day of October, 1946, Stephen W. Downey and John F. Downey appearing for Petitioner; J. R. Mason, one of the holders of outstanding bonds and coupons effected by the plan of composition herein, appearing in propria personem; and no other appearances being made by or on behalf of any other interested party or parties; [99]

After proceedings thereon said matter was duly continued to, and further hearing thereon was had, on the 15th day of November, 1946; thereafter, and upon presentation of a proposed order upon said Petition, Objections to said proposed order were filed by the said J. R. Mason; thereupon a hearing on said Objections was regularly set for the 28th day of December, 1946, and after due notice thereof said Objections were on said day duly heard and considered.

The Court, having fully considered said Petition and said Objections, and having heard evidence and argument thereon, and being fully advised in the premises, Now Finds:

That notice of hearing on said Petition and of hearing on said Objections was duly and regularly given in accordance with the Orders of this Court;

That all outstanding bonds and coupons of the above named Debtor effected by the plan of composition herein, and all claims of whatsoever nature based thereon, are now barred by the statutes of limitation applicable thereto and do not now constitute valid claims against said Debtor nor against said fund deposited by Debtor with this Court; that the owners and/or holders of said outstanding bonds and/or coupons are guilty of laches in the premises and are barred thereby and by applicable statutes of limitation from receiving any part of said fund on deposit herein and/or from asserting any claim whatsoever against said Debtor based on said bonds and/or coupons.

The Court Further Finds that it is nevertheless vested with equitable power and authority to authorize the owners of said bonds and coupons an additional period of forty-five (45) days from the date hereof within which to deposit said bonds and/or coupons with, and surrender said bonds and/or coupons to this [100] Court and to thereupon receive from said fund deposited by Debtor herein payment therefor at the composition rate approved in this cause; and

The said Debtor having no objection to such authorization and procedure:

Now, Therefore, It Is Hereby Ordered and Decreed:

That Merced Irrigation District, the Debtor herein, is entitled to have refunded to it all moneys now remaining on deposit with this Court from the fund heretofore deposited herein by said Debtor for the discharge of its obligations in accordance with the interlocutory decree in this cause;

That the refund to said District of said moneys shall, however, be withheld for a period of forty-five (45) days from the date hereof; that during said period of forty-five (45) days the Clerk of this Court, as Registrar of said fund, shall pay therefrom to the owner or owners of bonds and/or coupons effected by the plan of composition herein who shall deposit said bonds and/or coupons with, and surrender the same to this Court during said forty-five (45) day period such amount as is provided by the terms of the interlocutory decree herein;

That upon the entry of this Order and Decree Merced Irrigation District shall cause true and correct copies thereof to be sent by registered mail to the following named persons at the addresses set opposite their respective names:

J. R. Mason, 1920 Lake Street, San Francisco, California.

H. K. Busche, 335 Adeline Street, Oakland, California.

F. C. Busche, 335 Adeline Street, Oakland, California.

and shall cause additional true and correct copies thereof to be [101] placed in the hands of the United States Marshal for the Northern District of California with instructions that he serve the same on the said H. K. Busche and the said F. C. Busche personally if such personal service thereof can be effected by him:

That upon the expiration of forty-five (45) days from the date hereof, and upon the filing with this Court by Merced Irrigation District of affidavits showing that the matters herein required of it to be done have been done, the Clerk of this Court, as Registrar of the said fund deposited herein by Debtor, shall deliver all moneys then remaining therein to Merced Irrigation District, and said District shall thereupon acquire full title thereto and ownership thereof;

That upon said moneys being so paid to Merced Irrigation District this proceeding shall become and be finally finally terminated and closed.

Dated: Dec. 31, 1946.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed. Judgment entered Dec. 31, 1946. Docketed Dec. 31, 1946. Book 3, Page 413.

Notation made in Bankruptcy Docket on Dec. 31, 1946, pursuant to Rule 79 (a) Civil Rules of Procedure. Edmund L. Smith, Clerk, U. S. District Court, Southern District of California. By B. B. Hansen, Deputy.

A true copy.

Attest, etc. Edmund L. Smith, Clerk U. S. District Court, Southern District of California. By F. Betz, Deputy. Dec. 31, 1946.

RETURN ON SERVICE OF WRIT

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Order and Decree on the therein-named F. C. Busche by handing to and leaving a true and correct copy thereof with F. C. Busche personally at Oakland, Calif., in said District on the 13th day of January, 1947.

GEORGE VICE,
U. S. Marshal.
By /s/ R. CALMES,
Deputy.

[Endorsed]: Filed Jan. 22, 1947. [103]

United States Marshal's Office
Northern District of California

I Hereby Certify and Return, that I received the within writ on the 13th day of January, 1947, and personally served the same on the 13th day of January, 1947, on H. K. Busche, whose true name is A. K. Busche, by delivering to and leaving with F. C. Busche, her husband, an adult person, who is

a member or resident in the family of H. K. Busche, whose true name is A. K. Busche, said defendant named therein, at the City of Oakland, County of Alameda, Calif., in said District, an attested copy thereof, at the dwelling house or usual place of abode of said H. K. Busche, whose true name is A. K. Busche, one of said defendants herein.

GEORGE VICE,
U. S. Marshal.
By /s/ RAYMOND A. CALMES,
Deputy.

San Francisco, Calif., Jan. 13, 1947.

[Endorsed]: Filed Jan. 22, 1947. [104]

[Title of District Court and Cause.]

APPELLANT'S FURTHER DESIGNATION OF PORTION OF RECORD ON APPEAL

Whereas Appellee has designated certain additional Portions of the Record, to be printed, Appellant now designates the following additional portions of the Record as necessary:

1. Objections of J. R. Mason, dated October 26, 1946, Nov. 12, 1946, Nov. 21, 1946, and January 2, 1947.

2. Proposed Order, prepared by Appellee, pursuant to Nov. 15th proceeding, but which order was not signed by the Court. This proposed order was submitted to the Court Nov. 18, 1946.

Dated January 19, 1947.

/s/ J. R. MASON,
Appellant in Pro Se.

[Endorsed]: Filed Feb. 19, 1947. [110]

[Title of District Court and Cause.]

STIPULATION

For the purpose of avoiding unnecessary cost in the matter of the Appeal by J. R. Mason, from the judgment against him, dated December 31, 1946, in the above entitled cause, it is stipulated that with the approval of the Circuit Court of Appeals of the U. S., for the Ninth Circuit, the record in the above cause printed by said Clerk in the cases of the appeals entitled "West Coast Life Ins. Co. v. Merced I. D. No. 9242," in the U. S. Circuit Court of Appeals for the Ninth Circuit, and also in the case of "J. R. Mason v. Merced I. D., No. 9955", in the Circuit Court of Appeals for the Ninth Circuit may be referred to or read from by either party to the appeal in this cause, insofar as the same may be relevant and material, with like effect as if the said record of the prior causes were embraced in the transcript in the appeal from said order of December 31, 1946.

Dated February 17, 1947.

DOWNEY, BRAND AND SEYMOUR,
Attorneys for Merced Irrigation District.

/s/ J. R. MASON,
Appellant in Pro Se.

[Endorsed]: Filed Feb. 25, 1947. [111]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111, inclusive, contain full, true and correct copies of Interlocutory Decree; Notice of Appeal from Interlocutory Decree; Objections to Proposed Final Decree; Proposed Final Decree, Discharge and Order Settling Report and Account of Disbursing Agent; Final Decree, Discharge and Order Settling Report and Account of Disbursing Agent; Notice of Appeal from Final Decree, etc., filed July 15, 1941; Petition of Merced Irrigation District filed July 30, 1946; Order Fixing October 29, 1946, for hearing Petition; Notice of Hearing of Petition of Merced Irrigation District, etc.; Objections of J. R. Mason to the Petition filed October 25, 1946; Affidavits of Publication in Merced Sun-Star and The Wall Street Journal;

Affidavit of Mailing of Notice of Hearing, etc.; Minute Ordered Entered October 29, 1946; Respondent's Reply to "Outline of Argument of Petitioner"; Letter dated November 12, 1946, to Honorable Paul J. McCormick from Downey, Brand & Seymour; Minute Order Entered November 15, 1946; Proposed Order dated November ...., 1946; Objections of Respondent to Order Proposed by Petitioner filed Nov. 22, 1946; Minute Order Entered December 14, 1946; Notice of Hearing to be held on December 28, 1946; Minute Ordered Entered December 28, 1946; Order and Decree filed and entered December 31, 1946; Objections by Respondent to Order Proposed by Petitioner filed January 3, 1947; Notice of Appeal from Order and Decree filed December 31, 1946; Bond for Costs on Appeal; Order Staying execution; Statement of Points on Appeal; Appellant's Designation of Contents of Record on Appeal; Affidavit of Compliance by Merced Irrigation District with Requirements of Order and Decree; Marshal's Return of Service of Order and Decree; Appellee's Designation of Portions of Record; Appellee's Further Designation of Portions of Record; Appellant's Further Designation of Portions of Record and Stipulation re Records on Previous Appeals which, together with copy of Reporter's Transcript of Proceedings on October 29, November 15 and December 28, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing,

comparing, correcting and certifying the foregoing record amount to $33.55 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of February, A.D. 1947.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, October 29, 1946. 10 A.M.

The Clerk: No. 4818-Bankruptcy, In the Matter of the Merced Irrigation District.

The Court: Proceed, gentlemen.

Mr. John F. Downey: If it please the court: This is the petition of the Merced Irrigation District in this matter, praying that the unexpended funds now on deposit with this court for redemption of bonds at the composition rate, as heretofore decreed, be now refunded to the district, in that they are still unexpended, and that the proceedings now be finally terminated.

There are certain facts that appear in the record, dates, and so forth, which I am going to be constantly referring to, and I have prepared an outline of the argument which I am going to make, which I think the court might wish to refer to.

The Court: Did you give counsel on the other side a copy of it?

Mr. John F. Downey: Mr. Mason has a copy of it, yes, your Honor.

The facts in this matter, as appear in the record, are that in 1938 a petition was filed by the District for the composition of its debts. After hearings on this petition an interlocutory decree was made on February 21, 1939, in which it was provided that

the bonds of the debtor be [2*] discharged at about 51 cents on the dollar. Appeals were taken from this interlocutory decree, and it eventually became final on February 10, 1941.

Shortly thereafter, in accordance with the terms of the decree, the money was made available through a disbursing agent for the payment of these bonds at the composition rate. That was on April 1, 1941. The money was in the hands of this disbursing agent for a period of two months, and then, as provided by the decree, was deposited with this court for the further redemption of bonds that would be turned in. That was on June 2, 1941.

Subsequently the final decree was entered, discharging the District from its debts, and providing that this payment at the composition rate would discharge all of those obligations.

Now, in that decree it was provided, and I quote:

> "If any money shall remain in the hands of the Registrar after petitioner claims that the Statute of Limitations applicable to its still outstanding obligations, if any, has run, petitioner may so report to this Court for such further action respecting said money remaining in the hands of the Registrar as this court may determine to be proper and for the final closing of this proceeding."

Our petition is brought pursuant to this provision in the [3] final decree, it being our contention that the statute of limitations has now run.

Appeals were taken, or an appeal. Mr. Mason,

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* Page numbering appearing at top of page of original certified Transcript.

who is here today, appealed it and that became final on November 9, 1942.

As to the other outstanding bondholders, who are not here today, they did not appeal, and, consequently, as to them the final decree became final three months after it was filed, which would have been October 15, 1941.

There now remains in the court the sum of $32,-811.59, and it is this sum that we now petition the court to return to the debtor, and to finally terminate these proceedings. [4]

Mr. John F. Downey: Now, while we are waiting for Mr. Neel, if the court please, we would like to reach a stipulation on certain matters to make them clearly of evidence in this proceeding today, and we would like to ask Mr. Mason if he would stipulate that the record on appeal from the interlocutory decree and from the final decree be stipulated to be in evidence in this proceeding.

Mr. Mason: May it please the court: I am not of the bar, and as to these technical questions on procedure, I am not familiar with them.

I would prefer to keep this record to a minimum, if possible, for obvious reasons, and if it is going to mean incorporating all of the previous testimony on any appeal that might be taken from this honorable court, I would prefer not to so stipulate. [18]

Mr. John F. Downey: Suppose we put it this way, Mr. Mason: Our purpose in desiring this stipulation is simply to show that Mr. Mason did actually appeal from the final decree and from the interlocutory decree, and, therefore, had actual no-

tice of these decrees. I think if Mr. Mason will stipulate he has had notice of the decrees and of the deposit of the money with the disbursing agent, I presume that such a stipulation would be sufficient.

Mr. Mason: Your Honor, I have known of the decrees, but I have always questioned the extent of the jurisdiction of these proceedings under Chapter IX.

Does that answer the question?

Mr. John F. Downey: Let's put it this way: Will you stipulate, Mr. Mason, that you had notice of the interlocutory decree and the final decree, and that the money was deposited to redeem the bonds at the composition rate provided by the court?

Mr. Mason: I knew that money had been deposited with the clerk of the court, but that money was not a legal tender under California decisions, which hold that a partial offer of payment is never a legal tender. I have a citation on that which I can submit. I was aware of the proceedings, but I have never recognized that the authority granted under Chapter IX goes as far as some counsel have argued.

Mr. John F. Downey: Mr. Mason, of course, we do not [19] intend by the stipulation to get any agreement from you as to the legality, or the jurisdiction, or anything of that nature. Our stipulation desired simply to show that you knew of these matters and knew what transpired in this case throughout.

Mr. Mason: I think my first answer would ap-

ply. I knew about the proceedings, yes. I have followed them. In fact, in this instant petition, I had no copy of your petition. I had a little informal notice, and I was required to go to Sacramento to get a copy of your petition. I was not supplied with a copy of it.

The Court: Do I understand, Mr. Mason, your basic objection is that the effect of the entire proceeding under the provisions of the Bankruptcy Act was to repudiate a debt, and that the whole matter is——

Mr. Mason: Not to repudiate a debt, your Honor. A tax is not a debt. This is a question of state valid taxes being abrogated by federal statute.

The Court: I am speaking of the obligations under the bond itself.

Mr. Mason: The obligation under the bond is merely a tax anticipation note, a mere promise by the state that taxes will be collected according to law, and when those bonds are destroyed, it simply means that the state's promise has been broken by federal decree. [20]

E. E. NEEL

recalled as witness on behalf of the petitioner, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Continued)

The Witness: Should I just read it?

By Mr. John F. Downey:

Q. Yes. This represents the outstanding obligations at the composition rate at the present time?

A. Yes. F. C. Busche, 33 bonds at $515.01, $16,995.33. H. K. Busche, 11 bonds at $515.01, $5,665.11. J. R. Mason, 18 bonds at $515.01, $9,270.18. Unknown bondholders, one bond, $515.01. This makes a grand total of $32,445.63, plus outstanding detached coupons in the amount of $365.96, making a grand total of $32,811.59.

Mr. John F. Downey: All right, Mr. Neel. That is all.

(Witness excused.) [21]

Mr. Mason: It seems to me, your Honor, that this instant petition must stand or fall on the language in the final decree which refers to a statute of limitations applicable to the still outstanding obligations; not applicable to the deposit with the clerk of the court. The language in the final decree is "Statute of Limitations applicable to the still outstanding obligations," which, manifestly, can only refer to the law of the State, inasmuch as the State was the creator of the obligation. [22]

Mr. Mason: That is perfectly all right.

I will get back to this Moody v. Provident case, (12 Cal. 2d, 389). After the portion that I quote in my objections there, your Honor, it is said:

> " 'That the statute of limitations, under the circumstances disclosed by this case, could never be pleaded by the district until it had the money in its possession to pay the bonds belonging to the plaintiff, and had given notice, is supported by the case of Freehill v. Chamberlain,' "—that language isn't to pay in part, or to partially pay. That language is quite explicit, in my opinion, and I believe there was an attempt of counsel to misread or rephrase that by contending that a partial tender is money to pay the obligation. We are referring to the obligation as it exists under the State law.—"where it was held that when a city issues bonds with interest coupons, payable as fast as money should come into the Treasury from special sources designated in the act, the statute of limitations does not commence to run against the coupons until the money is received in the Treasury in accordance with the terms of the act."

Now, there are many cases on this, but the fact is that [33] the Moody v. Provident case is the controlling law in California. It is the well settled law, California law, and counsel has stipulated, that the statute of limitation that he will rely upon is the State statute of limitations, and the State Supreme Court has settled clearly and unequivocally that as against these obligations there can be no statute

of limitations excepting under the circumstances stated in the decision of the court. That is my belief, and I submit to your Honor that that is the well settled law in California.

Therefore, if the turning of this motion rests on the State Court decision of the State law, I believe your Honor is familiar with this ruling by the Fifth Circuit Court of Appeals that Chapter IX is a special exercise of the bankruptcy jurisdiction, and is dependent on State consent and is limited to that consent.

Here is a very interesting case that I do not cite in my objections, your Honor, in 148 Fed. (2d) 945, Berry v. Root. There an effort was made under one of these Chapter IX proceedings in the Coral Gables case, where the attorneys who had done a lot of work went into court and asked the court to assess a charge for fees proportionately against all the creditors because the United States Supreme Court had set aside the Coral Gables bankruptcy. Coral Gables was the first city government to file a petition under Chapter IX, and Coral Gables was finally compelled to pay its remaining bonds, after [34] three visits to the United States Supreme Court. That was the final outcome of the Coral Gables case. But this arose after the United States Supreme Court had split four to four in the Coral Gables case, and an interesting thing on that, your Honor, is that on the same day the Coral Gables case was decided four to four, the case of Wells Fargo Bank v. Imperial Irrigation District was also decided by the United States Supreme Court. The

Ninth Circuit Court of Appeals had ruled inconsistently with the Fifth Circuit Court of Appeals, but the vote in the Supreme Court was four to four, which meant the new ordinance was sustained. But this was after the Coral Gables decision. Here the court said:

> "While a court of bankruptcy often applies equitable principles, and may sometimes entertain a controversy in equity arising out of the bankruptcy in which it will follow the precedents and practice of a court of equity, yet as respects the original bankruptcy proceeding it is not strictly a court of equity, but a statutory court created by the Bankruptcy Act, and governed by it." [35]

May I also point out that in the case of the Imperial District final decree and in the Colusa District final decree, and several others, there was no time limit whatsoever [36] inserted in the final decree,—none. Also, this money on deposit with the clerk of the court, in my view, is under the control of this honorable court and is governed by federal law and is governed by judicial code title 28, sections 851 and 852, which provide that when any money has been so deposited, under a proceeding such as this, the general nature of, and is not called for within—I forget the exact language, but let us say whatever day the court may believe to be a reasonable time, that money must be turned over to the Treasury of the United States and held by the Treasury of the United States without time

limitation until claimants making and showing proof of right, title and interest in and to the money come along, without any suggestion of a time limit. [37]

The Court: Of course, your argument is contrary to the views of the court on the origin and status of these obligations. I do not consider the taxing feature to be decisive in these debt readjustment proceedings. I think it is a contractual obligation, and unfortunately and unhappily, the Supreme Court has said that repudiation of a debt is justifiable under the distressful circumstances that confronted these districts during the period involved.

Mr. Mason: I know it appears that way, your Honor, but in the Fallbrook case the same taxing statute stood up against the bankruptcy power, you will remember. [41]

The Court: Even in the gold clause cases the Supreme Court stated that an obligation of the government of the United States could be repudiated by an act of Congress, and that the repudiation was enforcible legally.

Mr. Mason: Yes.

The Court: If that is the rule, where is there any leeway in this court, which is bound to accept decisions of superior authority? This court does not have any leeway and cannot say that the Supreme Court did not mean what it said in the Bekins case.

Mr. Mason: Well, it did not say what people think it did.

The Court: That is your argument, but I do not believe I can accept it. I think the conclusion

as between the decision in the Ashton case and the decision in the Bekins case is irreconcilable.

Mr. Mason: My contention is that there were no conclusions in the Bekins case further than a bald statement that the Act itself is not unconstitutional. It went up on a simple demurrer with no facts, and no court is required to declare an Act unconstitutional until facts are before it. Unless that is true, the Act should be declared constitutional. But I did not mean to get into that, your Honor.

The Court: It is an interesting argument.

Mr. Mason: But with respect to the gold clause decision, [42] may I point out that the power to coin money is a federal law.

The Court: So is the power to enact a Bankruptcy Act.

Mr. Mason: But never was it decreed to include the sovereign power to tax lands,—never. Where we are in the position where Congress cannot tax land but Congress can untax land, we open the gates for the same troubles that the German Republic experienced. I was there. The Weimar Republic States had the power to tax lands, and the Reich did not, but the Weimar Republic, instead of trying to liquidate the states by a bankruptcy clause, passed a very simple statute saying that the sovereign powers heretofore vested in the Weimar States are transferred to the Reich. The rest was easy.

The Court: Of course, it is an easy thing now to look back after the war, with the economic changes that have ensued because of the war, and

say that probably the debt readjustment proceedings under the Bankruptcy Act, as sustained by the Supreme Court, were not quite as equitable as they should have been. But supposing there had not been these eventualities that have transformed the economic conditions in these irrigation districts. Then what?

Mr. Mason: May I answer that? It would have been the greatest blessing that could have happened for the returning soldiers, for the G.I.s, who would then have been able to go into any of these districts, and without paying fabulous bonuses to racketeers who have speculated in these lands. [43] Today the G.I. coming in is so handicapped because he has to pay these terrific bonuses for permission to use a plow. I submit that is what would have happened.

The Court: Maybe so. You may be a prophet, or you might be a good guesser. But we know what has happened, and I am talking about the history of the times.

Mr. Mason: I know what has happened in other districts, where friends of mine control more than one-third of the bonds, and where they were not able to go into bankruptcy.

The Court: If we look over the era of receiverships in the Federal Court, and if the judges had said, instead of attempting to rehabilitate in the economic circumstances that existed, "No gentlemen, sorry. You have three or four hundred employees here. We would like to keep them working, but there is no way in which you can extri-

cate yourself but by filing a petition in bankruptcy." Perhaps we would have done a lot better.

Mr. Mason: But the distinction, your Honor, here is that Congress has passed a rent control statute, which this Chapter IX proceeding directly contravenes.

The Court: I am afraid we are getting into an argument on economic problems which are way off from the point here.

Mr. Mason: I doubt that they are.

The Court: They may not be in the Supreme Court. I hope you may be able to convince the Supreme Court that they were [44] in error in some of these other Supreme Court cases.

Mr. Mason: Thank you, your Honor. I hope to have another opportunity. You may have noticed in the last case decided by the Supreme Court that they referred to persons in my position as "hold-up men within the law"—within the law, your Honor.

The Court: I have never characterized a man that way who put his money into a corporate enterprise, or his bonds, as a holdup man. I think it is very unfortunate that he has to accept less than the amount of his bonds, but that has been the necessity which has been brought about by conditions over which he has no control and in many instances the borrower has no control.

Mr. Mason: How could a man, when he is within the law, at the same time be a holdup man?

The Court: I believe we will have to stop the argument right here because I can see that you are

arguing contrary to [45] what I conceive to be the decisions of superior authority.

Mr. Mason: But may we come back to the real question on which this motion turns. This motion is a separate action, in my humble opinion. It raises a question of State law which has been construed by the State Supreme Court.

The Court: I do not think it involves a question of State law. It involves a question of law under the Bankruptcy Act.

Mr. Mason: According to the language in the final decree, the statute referred to is the statute applicable to these still outstanding bonds, which can mean only one thing.

The Court: I have told you the court's view on that. You do not seem to want to accept it. It isn't going to be changed by just talk.

Mr. Mason: The court's view on what?

The Court: On the effect on these obligations. I have told you that under the provisions of the Bankruptcy Act there was a transformation, a modification of these obligations. There is no way of talking the court out of that view, because that has been settled.

Mr. Mason: All right. Then might I ask the court a question: There is a co-obligation, a co-debtor behind the bonds, namely, the County of Merced, and under the Bankruptcy Act the discharge of one debtor does not affect the co-debtor. I would like to ask the court whether in the court's [46] judgment the restrain contained in the final decree, which is very explicitly only a restraint as against

the petitioning debtor, or whether that restraint also includes a proceeding against the County of Merced, under a law which was at no time the law of this proceeding?

The Court: I don't believe the County of Merced was ever a party.

Mr. Mason: Never, to my knowledge.

The Court: We are not going to restrain anybody who is not before the court, Mr. Mason.

Mr. Mason: Thank you.

The Court: Now, may I ask you a question. You do not have to answer it unless you want to. Are you willing to accept the amount which the other bondholders have accepted for their obligations?

Mr. Mason: Your Honor, I am willing to accept it under protest.

The Court: That would not be an acceptance, of course.

Mr. Mason: I am——

The Court: They took theirs. They protested, too, I think.

Mr. Mason: I am sorry. They did not.

The Court: I mean they reluctantly accepted it; justly so. If a man loaned $100 to another, and the other paid him back $52, he would not very willingly accept $52 in cancellation [47] of the obligation. That is true.

Mr. Mason: It is a very interesting condition that I have been in for a great many years, attempting to defend the State against federal usurpation, and then to find that the thought is that Chapter IX makes any petition such as this obligatory

on the court to put through, because I feel the court has no jurisdiction over the debtor.

The Court: I wouldn't say that. You know, I heard this proceeding in its second chapter. I heard the evidence, and I entered the decree.

Mr. Mason: Yes.

The Court: I am speaking of the presiding judge of this court. There was no question of that kind. We determined at that time that it was feasible and equitable, and we have no regret, no qualm of conscience, no feeling of remorse, or anything of that kind. We are sorry that the law was in that shape. We regret that the economic conditions were such that it made it necessary to enter such a finding, but we are not sorry that we did it, because we did what we felt was right.

Mr. Mason: I am sure you did, your Honor, but I just want to point out that this court had no jurisdiction over this bankrupt at any stage in the proceedings. The bankrupt has never been under its orders, at no time. You did not have authority, then, to pay one cent more or less. I submit that the court has had no jurisdiction under Chapter IX, and [48] it is indeed a novel condition where, we will say, it is only the creditor who is subject to the court's order, and not the debtor. It is novel, is it not, your Honor?

The Court: You have not answered my question, Mr. Mason.

Mr. Mason: Your Honor, I do not want to be unreasonable. I have done what I believed was for the best interests of the general welfare in all these

matters. If you tell me that I either must unqualifiedly accept the offer or I am alienated, if that is the demand or suggestion, I would just like to know.

The Court: I haven't made any suggestion. I have asked you a question.

Mr. Mason: Don't you see the very puzzling position, from my standpoint?

The Court: I am not asking you to place yourself in any position you do not want to place yourself in.

Mr. Mason: Here the bankrupt is asking for money which clearly does not belong to the bankrupt by any law cited by the bankrupt, and is asking for money which is clearly a part of my money. I think this is a separate cause of action from the final decree, and, as I say, your Honor, I will accept the money, but under protest, if that meets with your——

The Court: No, you would have to be on a parity with the others who have accepted their money. We cannot discriminate in favor of one bondholder against the other, or in favor [49] of the others as against one.

Mr. Mason: Well, your Honor, in other words, if nine men commit suicide the tenth man cannot question but what he must,—the fact that these others voluntarily gave up their bonds? It was not done by court order.

The Court: The tenth man can save himself, but he has to do it himself and without any equivocation.

Mr. Mason: That is what the tenth man is trying to do, your Honor. I am not trying to equivocate, not intentionally. The point is this, your Honor: If these bonds are surrendered and canceled, the title companies will again write title insurance policies on that land in that district. That is why they are so anxious to get them out of the way, because the title companies do not recognize this controversy as final.

Your Honor, I appreciate the time you have given me. I have been struggling for what I believed was right for a good many years. If the judgment of the court is that I must either take the money or get nothing, I will take the money, but I would prefer to reserve the protest, because I am doing it under protest, and not willingly, and only under court order.

The Court: I am not going to order any such thing. I am going to rule on this application of the Merced Irrigation District. [50]

Mr. Mason: That rule is that if I don't take the money——

The Court: I haven't ruled yet. I have asked you a question.

Mr. Mason: You would not permit the matter to be further briefed?

The Court: I would if the court's mind was at all uncertain about its duty in the case, yes. But it is not.

Mr. Mason: You feel that your duty is to give that money to the bankrupt?

The Court: No, I didn't say that. I would like

to give the money to the bondholder, but I want him to place himself in the same position as the other bondholders.

Mr. Mason: But the other bondholders did not place themselves in any position with this court.

The Court: There is no use of arguing that, because they did. They have accepted their money in satisfaction.

Mr. Mason: They did that long before there was any petition here.

The Court: There is no use in arguing. I am not going to discuss it any longer with you.

Mr. Mason: All right, your Honor. If it is your Honor's thought that he is compelled to do something, which I did not think he was compelled to do, I will place myself in the court's hands. I have been told by very able counsel that I was fighting something that was just as ineffective as tilting [51] at windmills; that we are going to have inflation and that the taxing power is going to be overthrown, and it was a futile attempt to defend the State's taxing power, which is what I have been doing, your Honor, for these many years.

I will take the money, your Honor.

The Court: You are taking that money without any reservation or any condition?

Mr. Mason: If the court is unwilling to accept my statement, "with reservation." If the court would allow me to do it under protest, to show that I didn't surrender.

The Court: I don't think that would be proper. That would render the whole proceeding, in my

opinion, ineffectual, Mr. Mason. We have to decide things in the court.

Mr. Mason: It will not render the proceeding ineffectual if the proceeding is one that will——

The Court: The alternative on that is for you to not accept it. I am not telling you to accept or to not accept. I am putting it to you, and you are sui juris to a pretty high degree. You have the right to accept the decision of this court, and if it is adverse you have a right to pursue your remedies to review it. Nobody is trying to persuade you or coax you or suggest to you or intimate to you in any manner or degree that you should waive any such right.

Mr. Mason: Yes.

The Court: If you are willing to take this money on a [52] parity with the other bondholders, on the same basis under which they have taken theirs and canceled their obligations legally, that is one thing. But if you do, you must do so without any restraint or condition.

Mr. Mason: Might I inquire what would become of the Busches' claim?

The Court: They have not appeared here. I don't know. I might continue that for 30 days, if we have any equitable power, and I am assuming that we have. Otherwise, the District would be entitled to insist upon the letter of the law.

Mr. Mason: On the equitable power of the Berry v. Root case, it goes directly to the question of the court having equitable power.

The Court: I am inclined to think that as to the

amount in the registry, that we have some control of that amount.

Mr. Mason: I believe that is beyond the control of the District, however.

The Court: I say I am taking that view of it. I want to know what your position is. You have not stated it.

Mr. Mason: I have stated that I would take the money, and under protest, and if that is unsatisfactory, may I have an opportunity to advise with counsel, because I am acting as my own counsel?

The Court: I understand that. That is the reason I [53] prolonged the discussion, Mr. Mason. If you had been an attorney representing an interest, I would not have discussed it to this length.

Mr. Mason: Might I have 30 days, your Honor?

The Court: Would you need 30 days?

Mr. Mason: I don't know.

The Court: Suppose you take 10 days. You ought to be able to make up your mind in 10 days.

Mr. Mason: But, your Honor, the District cannot claim that money which does not belong to them.

The Court: I am not thinking of the District, and I am not particularly thinking of you. I am thinking of this court's work in keeping matters on its calendar when it does not seem necessary to do so. Thirty days is quite a long time.

Mr. Mason: My objection points out, your Honor, and by referring to this instant petition, the question in this instant petition, I submit you can

dismiss the whole proceedings and let the State Court settle it.

The Court: I am not going to do it because it is not the State Court's responsibility.

Mr. Mason: The statute of limitations is a State law; I mean the statute of limitations applicable to these bonds is clearly a State law. There is certainly no federal statute of limitations applicable to these bonds.

The Court: Do you want 10 days? [54]

Mr. Mason: Won't you let me have fifteen?

The Court: All right, sir. I will give you fifteen.

Mr. Mason: Thank you, judge.

The Court: We will continue the further hearing on this one phase of the matter until Friday, November 15, at 10:00 o'clock. That is a little more than 15 days.

Mr. Mason: Thank you.

The Court: And, Mr. Mason, we will ask you to manifest your decision, by filing a writing so that we can have it in the record, either way. You understand?

Mr. Mason: Yes.

(Whereupon, at 12:00 o'clock noon, Tuesday, October 29, 1946, an adjournment was taken until Friday, November 15, 1946, at 10:00 o'clock a.m.) [55]

The next point we wish to mention that is brought up in respondent's reply is the question of whether or not this court in this proceeding has equitable powers. That reply states that the court is not acting

as a court of equity. If that is true, our position is much stronger and much better here. If this court does not have equitable powers, we can see no way by which it could possibly turn the money here over to the bondholders at this stage of the proceedings.

But let us look at just what that case says. It is the case of Berry v. Root from which the quotation is taken, and I will read a little more at length from the quotation than is given in the respondent's reply. The court says: [62] (148 Fed. 2d, 945)

> "* * * While a court of bankruptcy often applies equitable principles, and may sometimes entertain a controversy in equity arising out of the bankruptcy in which it will follow the precedents and practice of a court of equity, yet as respects the original bankruptcy proceeding it is not strictly a court of equity, but a statutory court created by the Bankruptcy Act, and governed by it."

It would seem from that that although the court in this type of proceeding would have perhaps certain equitable powers in some instances, that it is actually a statutory court and not vested primarily with equitable powers.

We will discuss this a little bit later with regard to the equities that there may be here, but before discussing that I would like to point out our main premise in this case, and that is that regardless of whether this court in this type of proceeding may generally have equitable powers, it is our definite

position that in this particular proceeding it does not have those powers, because if the statute of limitations has actually run, as there seems to be no question, that is, if a statute is applicable and is running, then the rights of the petitioner can hardly be defeated by equitable rights, since the rights of the petitioner have become established as property rights, and if the statute of limitations has run, [63] the obligation has become extinct. The equitable powers of the court, it would seem, could hardly consider an obligation which has so become extinct.

As we pointed out at the last hearing, the statute of limitations is a rule of property and property rights actually vest by virtue of that statute. The property rights here, if the statute of limitations has run, has actually vested and the obligation has become extinct.

The court would, therefore, be without any true power to do anything about that obligation at this time. It would have but one recourse, and that would be to turn the money back to the District. In other words, what our contention boils down to is that if a statute of limitation is applicable here, as we have pointed out, it must be when that has run, if a property right is acquired and the property right vests, it cannot be divested, and that by virtue thereof the only thing the court can do now is to turn the money back to the District.

The Court: Do you have the Act there, Mr. Downey? Would you read that portion of the Act

again that relates either directly or indirectly to the question of limitations?

Mr. Downey: I think there is no mention of limitations actually in the Act. I can find nothing there that does say there shall be a limitation. We have to go outside of the Act and into State law to find the limitation in that regard [64]

The Court: I wonder whether there is any difference between an enactment under the Fair Labor Standards Act, the Wage and Hour provisions of that Act, which is a division of Social Security and which is an innovation in the law which has its origin in very recent tmes, so far as the statute is concerned, in this country, and provisions in bankruptcy [67] which are ancient, and which are derived directly from a constitutional provision in the organic law itself and indirectly from proceedings in bankruptcy, which antedate the Constitution of the United States, which, as I recall, were administered by the Chancery Courts in England. Isn't that true, historically?

Mr. Downey: I presume it is.

The Court: Do not presume it, because this court states it. Is that your recollection of the history of bankruptcy?

Mr. Downey: Yes, it is.

The Court: In other words, I am just interested in Judge Sibley's learned opinion in the case of Berry v. Root. I had not read it before. I saw the excerpt in Mr. Mason's brief and, of course, I am very hesitant to disagree with such a learned judge

as Judge Sibley. He is not only learned, but experienced. I am going to read it thoroughly.

Quoting from Mr. Mason's memorandum, just before the quotation from the case, Mr. Mason states on page 3, line 7, of his memorandum:

> "In a very recent case the Fifth Circuit ruled that in cases based on the same federal law as the instant proceeding, the court said: '* * * is not a court of equity but a statutory court created by the Bankruptcy Act and governed by it.' "

Now, while it is true that the public debt adjustment [68] amendments to the Bankruptcy Act are statutory, the Supreme Court of the United States has said that they are activities that are authorized under the constitutional grant of the people to the federal government to pass appropriate acts in support of that constitutional mandate. If that is true, while Judge Sibley undoubtedly is correct in his statement that the court is a statutory court, that is too simplified to determine just the composition of the bankruptcy proceeding under the public debt adjustment provisions of the Bankruptcy Act, because it does have equitable play. That is the very basis of it. In other words, the court, before the public debt adjustment can be effectuated, must make a finding that it is feasible and equitable. If it must make that finding, certainly it has aspects of a court of equity, and I don't think that you can detach these proceedings in bankruptcy for the adjustment of public debts from

the equitable zone of the United States District Court. It is true that it is statutory. Most of our Acts, unless they pertain essentially to those ancient matters that were within the cognizance of chancery courts, are based on statutes, Acts of Congress, but they are equitable, nevertheless. These bankruptcy proceedings, preferences, and so forth, are all in their nature equitable, and so where a bondholder asserts a right to a fund that is in the process of settlement in a liquidating or a quasi-liquidating activity in the federal [69] court, he comes into a court of equity, and his case is to be determined by the principles of equity. For that reason I think that this question of a statute of limitations is a question of laches, not a question of cold statutory application of the statutes of limitation, as is expressed in the State statutes; and if it is laches, then we have a right to consider all of the features that apply to an equitable proceeding, where the doctrine of laches is invoked by one of the litigants.

I am going to read this case a little more thoroughly, but I think probably that the isolated statement that Mr. Mason selects is a statement that is predicated upon his argument in this matter, and probably does not go to the basic equitable aspect of this case. Thus, this court's view is that Mr. Mason's standing is based in equity, and it is not based entirely upon a statutory right, but it is a right which arises out of a statute—it is true, an amendment to the Bankruptcy Act,—but it must be determined by circumspection, by looking at the picture from all points of view. And if we look at the

picture, this is about what it is: If the Reconstruction Finance Corporation, the government agency, had not come forward at the time and underwritten a new bond issue, there would not have been much outlook for the bondholders. It did come forward. It came forward for not only a private reason, to assist a disabled Irrigation District, [70] but it did so because of the public aspect of that matter. Not only from the standpoint of those who expected to use the water irrigation district, or its other appurtenances, but those who did lend their money originally with which that entity might be organized and function under the State laws. Therefore, there was a dual purpose that the R.F.C. had in coming to the aid of this District.

The contract provided that instead of getting a dollar for a dollar's loan, they got 52 cents for a dollar's loan. I think it was 52 cents, wasn't it?

Mr. Downey: About that.

The Court: That did not mean that those who had to sacrifice the 48 cents, in addition to the increment that they expected to get by reason of the obligation if there was liquidation,—I mean to say, that did not mean that unless they came forward within a specified time, an arbitrary fixed time which is not fixed in the law, and that is the reason I asked you to read that provision of the statute which specified limitations, that ipse dixit upon the happening of some event dictated by the District the individual who was required to accept the 52 cents for a dollar and the increments which he expected to get from that investment of $1, that if he cannot get it, it goes

back to the District. Why should it go back to the District?

Mr. Downey: Well, I think, as any other obligation, it [71] boils down to the old law of laches and limitations, that if a creditor allows an obligation to become stale, he has no further right to assert that obligation.

The Court: Mr. Mason did not allow it. He has been pretty active here in endeavoring to collect it, to collect all of it. He was not satisfied and, of course, is not now satisfied to accept it, but he has only one alternative now. He either has to accept it or reject it, and if he rejects it, he has to take the consequences which the law applies to those who have the opportunity even at the eleventh hour, to come in and accept the same burden which others who were similarly situated accepted. I cannot see any equity at all so far as the District is concerned.

Mr. Downey: Could I discuss it from the point of view of laches and equity, then, for a short minute?

The Court: Yes.

Mr. Downey: It is my understanding that in the exercise of equitable jurisdiction, the court exercises that and intervenes on behalf of a person who has equities. The test is, does the party on whose behalf the court intervenes have the equities? I think the test would not be whether the District has equities, but whether or not Mr. Mason and the other outstanding bondholders have equities.

Now, as regards Mr. Mason's equities, originally, as we mentioned, the final decree was proposed with

a one-year [72] limitation, and at Mr. Mason's instance, that was removed and a provision was substituted which said that the District might report back at the termination of the period of the statute of limitations for further consideration of the matter, and that was inserted in the final decree. In other words, Mr. Mason presumably extended the time from one year to a statute of limitations period, or an indefinite period. In any event, the extent to which he extended it was well known to him. As the court has noted, in a quotation from Mr. Mason which I read at the last hearing. Mr. Mason was opposing then the one-year provision, and in his opposition to that one-year provision he mentioned that the statute of limitations period would not be less than four years. It would seem by his own statement there he recognized the very definite possibility of a statute of limitations running four years. In other words, he has waited beyond that four years, and beyond five years, and although, as the court has said, he has continually attempted to secure his rights on this, since his last appeal from the final decree, at least so far as the records of this case are concerned, there is nothing to indicate that he has done anything, and that, of course, has been a full four years ago.

I think that, that being true, there is not any particular equity in him disregarding the District's equities, which I think the court can well disregard. The question is, is the [73] court going to intervene for this man and assert its equitable jurisdiction?

The test is, does this man entitle himself to the equities?

The Court: There may be an answer to this in the Lumber Products case. I think we had better get that Lumber Products case. The title of that case is Case v. Lumber Products. It is a Supreme Court case. It seems to me there is a principle there that answers that. The Lumber Products case, as I remember, was a reorganization of the Lumber Products Corporation, and a subsidiary, the Los Angeles Shipbuilding Corporation. I am speaking now just from memory. We will get the book in a moment. A number of persons were interested in rehabilitating those concerns, which was during the depression, I think, and they came forward and were willing to underwrite a reorganization by putting up certain moneys, provided they were given a preferential place in the picture. There had been preferred stockholders and bondholders, and the suggested plan was that those who came forward with the moneys sufficient to rehabilitate the concern would be substituted in the place of the bondholders and would be given preferred stock, as I remember it. That plan was eventually approved, because the Circuit Court of Appeals affirmed the decision of this court for the Southern District of California. The case then went to the Supreme Court, and in an opinion there by Justice Douglas, I think, this ancient principle of the [74] obligation of a contract was the paramount question, and although I think there were one or two minor bondholders there, out of a large number of

persons who acquiesced in the plan and agreed to it, who did not so agree, the court said: No, you cannot do that. There is an obligation of a contract that is inviolable, and it cannot be done in that way.

This is the case of Case v. Los Angeles Lumber Products Co., Ltd., 308 U.S., commencing at 106.

Now, in our statute, what are the adjectives used there? I haven't read it in the last week or so. Are the words "fair and equitable" used in our statute with regard to the approval of the plan?

Mr. Mason: Words to that effect, your Honor.

The Court: "Feasible," I think it is, "and equitable"; something like that.

Mr. Downey: "Fair, equitable and for the best interests of the creditors."

The Court: "Fair, equitable and for the best interests of the creditors."

Now, in this portion of the opinion in the Lumber Products Company case, it is stated—there is a lot more of it, and I am not going to read it all, but I think the principle here is just the same as in the Lumber Products matter:

"At the outset it should be stated that where a plan is not fair and equitable as a matter of law it cannot be approved by the court even though the percentage of the various classes of security holders required by Sec. 77B(f) for confirmation of the plan has consented. It is clear from a reading of Sec. 77B(f) that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable.' The former is not a

substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in this case are entitled to the court's protection. Accordingly the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one. This is in line with the decision of this Court in Taylor v. Standard Gas & Electric Co., 306 U.S. 307, which reversed an order approving a plan of reorganization under Sec. 77B, in spite of the fact that the requisite percentage of the various classes of security holders had approved it, on the ground that preferred stock of the debtor corporation was inequitably treated under the plan. The contrary conclusion in such cases would make the judicial determination on the issue of fairness mere formality and would effectively [76] destroy the function and the duty imposed by the Congress on the District Courts under Sec. 77B. That function and duty are no less here than they are in equity receivership reorganizations, where this Court said, 'Every important determination by the court in receivership proceedings calls for an informed, independant judgment'." Citing a case.

"Hence, in this case the fact that 92.81% in amount of the bonds, 99.75% of the class A stock, and 90% of the class B stock have approved the plan is as immaterial on the basic issue of its fairness as is the fact that petitioners own only $18,500 face amount of a large bond issue.

"The words 'fair and equitable' as used in Sec.

77B(f) are words of art which prior to the advent of Sec. 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, . . . we adhere to the familiar rule that where words are employed in an act which had at the time a well-known meaning in the law, they are used in that sense unless the context requires the contrary. . . .

"In equity reorganization law, the term 'fair and equitable' included, inter alia, the rules of law [77] enunciated by this court in the familiar cases"—citing a number of them. "These cases dealt with the precedence to be accorded creditors over stockholders in reorganization plans."

Then the court go on, through Justice Douglas, to analyze those terms, "fair and equitable," "fairly and equitably treated," "adequate and equitable," "just, fair and equitable," and like phrases, and concludes as I have stated, that the proposed plan should not be effectuated so as to defeat even these small bond holders from the enforcement of their obligation. That is the principle that, I think, is the polestar in this proceeding. The District certainly has no equities here. It was a failing venture. Had it not been for the governmental agency that was set up for the purpose, not exclusively of assisting disabled irrigation districts, but for that purpose in addition to the public aspect, the question that a great many people had invested in irrigation district bonds, that it was a matter of general public interest, and that, therefore, the govern-

ment, through its agency under the bankruptcy provisions of the Constitution, in those periods of distress should come to the aid of those entities, and as far as it could, appropriately assist in the rehabilitation of them.

Now, a bondholder has a right to stand on his obligation in this case as long as he can, and to litigate and to [78] contest and to attempt to collect his money, and because he has done so he cannot be said to have waived any equities which, under the principle of the Lumber Products case, he has always had. It seems to me that on the score of equities, we have a right to take the history of the times into consideration in these cases. We know now, or, at least, we feel that the situation now is entirely different in these irrigation districts. That was one of the fortunes of war, if there are any fortunes of war, that the farmers in these areas have been able to rehabilitate themselves, and the Districts have pretty well gotten out of the red. So if this money goes back to the District, it is simply in the nature of an unjust enrichment. It is just that it has been able to accumulate in the reservoir of the District moneys which it does not need, and the one who has left the money is the creditor who, simply because he attempted to assert his rights, must now, because of the limitation of a certain time which the District is attempting to fix, as they say, lose it. The court has not fixed any time, and that may have been in the mind of the court at the time that the first presentation of the decree occurred, in which there was a fixed limitation within

which time the creditors must present their bonds.

Mr. Downey: Your Honor, let me consider two or three things here. With regard to the provision as to a fair and equitable plan, this, of course, has been determined to [79] be a fair and equitable plan. The payment of fifty-one and a fraction cents on the dollar has been determined to be the fair and equitable method of reorganizing this District. The question then is, isn't that final and complete, when that determination is made, as far as the fairness, and the equities, of the original plan is concerned? The pressing of the point continually thereafter in an attempt to secure the full amount should be subject to that determination that has already been made, that the plan of composition is fair and equitable.

I think it would follow from that that, so far as the equities in that regard are concerned, the continual attempt to secure more than what is fair and equitable, which has been determined to be fair and equitable, is not something that should entitle a man to the equities in the equitable powers of the court.

Also, as far as what is fair and equitable is concerned, certainly if a one-year limitation had been fixed, as it was in many cases, that would have been proper and adequate. It has been held to be so in cases reviewed by the United States Supreme Court. Of course, that wasn't done here, but it does have some bearing on the question of what is equitable and what amount of time is reasonable. It might

also, by analogy, be said to fix a time within which laches or some other limitation might run. [80]

The Court: That is true. There are many cases, of course, involving the doctrine of laches in which the courts have used as a yardstick the local statute of limitations on similar questions, but that would be the extent. As I remember, there were those cases. The court of equity is to be guided by its own conscience. It must use these yardsticks which have been set up by judicial precedents, and so forth, and that is all. There is no statute.

Mr. Downey: Let me go into another question here, then. It can perhaps be said that by the continual assertion of the right, a man cannot be held to have laches run against him. But as to the other bondholders here, we have a matter then that would certainly not fall within that category. They have done what would be, I think, considered by all courts of equity as something which constitutes laches. In the first place, they did not appear in the original proceeding, which, of course, they were under no obligation to do. But they were notified of the availability of the money that had been deposited for them. They were notified of the proceeding as it went along. They were notified of this hearing, and still they have not even seen fit to make an appearance or to come into court and find out what the proceeding is about. I think by any definition of laches, what they have done would certainly constitute laches, especially since it has gone on for a period of many, many years, and for a period of more than [81] five years since the final decree. So

even if the court is to consider that Mr. Mason has certain equities here which would prevent him being barred by laches, that argument can hardly go to these other bondholders, who have continuously over many years sat back and never even raised a word on their behalf, and have never made any attempt, though advised, to take this money which the court awarded them on their bonds.

The Court: Those who have not appeared, of course, are not in the same situation that Mr. Mason is in. We have to apply all of these principles. The only phase that presents an appeal to the court of equity would be whether or not there should not be some stay, particularly in view of the fact that you say you are going to review the decision if it is adverse, and whether we should not hold the fund here, so as to safeguard the interests of others.

Mr. Downey: If the court please, I did not mean to indicate that we would necessarily review the decision. I was thinking in terms of the record. I was thinking the decision might go either way.

The Court: I did not mean to take any offense. I think you have a right to review the decision, and we want to put the record in shape where you can review the decision. But at the same time we want to hold the funds, if the decision is as we think it should be with respect to bondholders, so that the money will be available without further effort on the part of those bondholders to recover it.

I do not take the view that you argued, Mr. Downey, that when money is deposited in the registry, as it is deposited here, that the court is an auto-

maton. I think the fund comes here for administration under the equitable principles that are applicable in law to the cases where the money is deposited.

There does not seem to be much else to say. I notice that Mr. Mason in his final concession states the following:

> "It is therefore respectfully submitted that the petition be dismissed, that the funds in the custody of this Court be paid out only upon valid and lawfully proven claims, or should the petition be allowed, that the proceeding be wholly dismissed, lifting the restraints against the holders of still outstanding bonds, and Respondents be allowed access to the courts to seek the protection guaranteed to the holders of valid, binding and unpaid local government bonds secured by the Califorina and Federal Constitutions.
>
> "Should this prayer be wholly denied, Respondent will, if left no alternative, deposit his bonds with this court, but such deposit will be without consent to jurisdiction, without prejudice and without waiving any [83] substantive or procedural vested rights."

What does that mean, Mr. Mason?

Mr. Mason: If it please the court: I am not at all qualified to state in the technicalities and niceties of the law. Firstly, might I mention that the distinction, in my humble opinion, between Chapter IX and Chapter X, which was the statute on which

the case of Case v. Lumber Products rested, is that the Lumber Products case involved a contract between two private interests. The contract in the bonds at bar is not a contract between private interests, but a contract made for the State of California.

The second point is that Chapter IX contains a provision, I believe, under which nothing may be ordered by the court which is not accepted by the bankrupt. I believe that is unique in the bankruptcy statutes. Speaking of the old common law, was it ever known that the bankrupt was beyond the jurisdiction of the court, and only the creditor was subject to the court's decree? I am merely asking.

I believe that does distinguish Chapter IX from any other statute. There is nothing the court can do under the Chapter IX provisions, other than to approve the plan as submitted, or it can make no modification of the plan without the consent of the bankrupt.

I would just like to say this. My interest here is not primarily pecuniary. The court's remark about the Merced [84] District, to the effect that if the R.F.C. had not come to its rescue, it would be—and I forget the exact words, but I would like to comment on that for a moment, because I was one of those who handled the original bonds of that District. I was then fairly active in the underwriting of securities of this nature, and I have studied the history of irrigation and irrigation districts. I would like to just point out to the court a little the

objective of this whole Chapter IX proceeding, not in relation to county and city bonds, because there have been many such in Florida, and elsewhere, that have taken advantage of Chapter IX, but with respect to the irrigation aspect in California. At the time this Chapter IX was first enacted, the appraised value and the estimated true value of the taxable lands within California Irrigation Districts was estimated by the Irrigation Districts Association of California, which is the official body representing all the districts, to be in excess of one billion dollars, and at no time has there ever been as many as one hundred million dollars of irrigation district bonds outstanding in California. Looking back over California, the inexpensive water supplies were those first undertaken. Since the inauguration of these Chapter IX proceedings, the United States government has appropriated over five hundred million dollars for new similar irrigation works in the West, which represents an average investment per acre of 800 per [85] cent of the appraised figure of the R.F.C. on these old irrigation districts in California—no, I mean 800 per cent of the original bonds outstanding and 1600 per cent, sir, of the R.F.C. appraisal of the value of the securities on these old bonds, which I submit leaves serious doubt that the Merced Irrigation District was not fully able at all times to have met its lawful obligation, and I would just like to offer a statement made in 1932 by the Irrigation Districts Association at their annual convention, in which they called attention to a tax strike, which had been,

according to the Association, fomented, and I would like to read the words of that Association:

> "These interests are now attempting to foment a tax strike; they are attempting to throw the District into default;"—this was with respect to the Imperial District—"they are handicapping the Board of Directors in every way possible, and are apparently influencing the banks to indirectly aid them in their nefarious scheme.
>
> "They are willing to wreck everything and everybody in order to prevent that electric power being generated by the irrigation district.
>
> "This attempt to wreck the district and its 62,000 people in it is dastardly, and this association and every person in the district should put forth [86] every means in their power to aid that District and its Board of Directors to prevent this outrage."

But I submit this tax strike went over the State. The Merced Irrigation District is one of the oldest communities in the State. It includes the City of Merced. The City of Merced bonds were never defaulted. The City of Merced bonds are secondary in line, under California law, or at least not prior in line to the Irrigation District bonds. The Irrigation District includes the City of Merced and some 150,000 odd acres surrounding it.

I just wanted to comment on the court's remark there, because I have never subscribed to the belief that these communities were unable to collect the

taxes. Certainly they lacked no taxing power. They simply did not exercise their taxing powers, and my position has been from the beginning that was entirely an affair of the sovereign State of California, and on the basis of the Supreme Court opinion in the Bekins case, may I respectfully point out that the court in the Bekins case pointed out explicitly the protection, the safeguards, the conditions inserted in the amended Chapter IX, which the court said would prevent the court at any time from issuing orders or decrees inconsistent with State law.

Now, it appears puzzling—it is puzzling. I have taken many petitions to the United States Supreme Court, all of which have been denied, based on the actual facts, but my [87] position simply is that a denial of a petition is not tantamount to a reversal of a principle of constitutional law. I just wanted to clear up, if the court has the thought that my interest is a selfish one——

The Court: I had not thought of it at all. I think the court's observation would indicate otherwise. We just dealt with you as a creditor.

Mr. Mason: I just wanted to make sure of that point.

Now, with respect to the point that Mr. Downey has focused on here in our November 12th communication, he says that: It is our position that the court is without jurisdiction, if it now desires to do so. Mr. Downey has not commented on the Moody v. Provident Irrigation District ruling by the California Supreme Court, which, your Honor,

in my humble opinion, is controlling of the basic question before the court in this proceeding, which is whether or not the statute of limitations applicable to those still outstanding bonds has run.

Now, in this Moody v. Provident case, the Irrigation District before the court took the opposite position. It was the Irrigation District which insisted there could be no statute of limitations under the law, and the California Supreme Court agreed with the Irrigation District, and this decision is the controlling law—is controlling of the State law, in my humble opinion. [88]

Mr. Downey has suggested no opinion which reverses or modifies or overrules it, and I believe, your Honor, in the San Joaquin Irrigation District case, which is still pending before Judge Welsh, and I believe this is the fourth start the South San Joaquin District has made to try to bludgeon the so-called minority creditors, but Judge Welsh has not even approved their petition. The interlocutory decree has not yet issued in that proceeding, and the Equitable Life Insurance Company and myself are the main objectors.

Whether or not it would be appropriate to ask the court, in view of the suggestion by Mr. Downey to lift the restraints, Mr. Downey complains that I have been pressing for the money. I have been under the restraint of the court. I could not make a move, and, therefore, he says I have been guilty of laches, and I can't quite reconcile that.

I would like, your Honor, to point out that even if there have been a statute of limitations appli-

cable to these bonds, that under California law the equities in those bonds are not gone, and a more recent opinion by the California court than that Raisch v. Myers case which I cited in my original reply can be found, and it supports that Raisch v. Myers ruling, which involves bonds that have outlawed. The more recent case is Ward v. Chandler Sherman Corporation, 76 A.C.A. 453, which involved some State improvement bonds which admittedly had outlawed, but the court points out that even after they [89] have outlawed, that when, as and if the money is received from the delinquent taxes, that that money must go to those outlawed bondholders.

The Court: On the trust fund theory?

Mr. Mason: On the trust fund theory, yes, your Honor, and even assuming that the discharge is final in this proceeding, with which I do not agree, but even assuming that it is, there is a very important decision, it seems to me, a recent one by the Nebraska Supreme Court on June 28, 1946, Omaha US Employees Federal Credit Union v. Brunson, 23 N.W. (2d) 717, in which the court says that the discharge of a bankrupt does not affect securities, and they are subject to a judgment or decree in rem, but the creditor applying for such remedy may be required to await the result of the bankrupt's discharge, if the bankrupt or assignee insists upon it, but while a mortgage does not convey title, nor vest any estate in the mortgagee, it is not released by the mortgagor's discharge in bankruptcy.

Here, if it please the court, we have state obliga-

tions, which are prior in lien to any mortgage. Taxes in California reach ahead of any mortgage, and that was clearly before this court and before the court above in the Fallbrook v. Cowan matter. Let us just take Mrs. Cowan's case. Would two Mrs. Cowans have rights that one Mrs. Cowan would not have? Would any multiple of Mrs. Cowan have rights that Mrs. Cowan [90] did not have? The three-year privilege had run. The privilege of redemption had expired. She was not allowed under the Circuit Court of Appeals decision to file under Section 675. Now, in the Merced Irrigation District they have allowed the three-year statute to more than run under the same basic law.

I question that that was the intent of Congress, to authorize its courts to do for Mrs. Cowan doubled, let us say, and to do in similar circumstances what the court could not have done for Mrs. Cowan individually.

Here we have a case of a State agency, State taxing agency, State tax officials who have absolutely flouted State law since 1932, and, in substance, they are asking this court to sanction and approve their violation of the mandatory State taxing statutes. Would it be any less if the State of California had enacted a statute authorizing State courts to allow citizens to escape paying valid federal taxes than to assume that Congress meant for the Federal Courts to allow citizens of a State to own land and escape paying the lawful taxes on that land, and to hold the land in clear, unequivo-

cal violation of that State law? That is still the unsettled question in this Chapter IX matter that worries me, your Honor.

I do not believe that our States should be allowed to go to Washington to ask for help every time they break their [91] finger. I believe it lies entirely within the power and authority of the State to take care of its own fiscal affairs, and of its own local units of government. I know that my first business experience in the municipal bond business was long ago. At that time the City of Olympia, Washington, had been in default of its city bonds for over ten years, but nobody in those days suggested going to Congress to get the medicine. Another case was Owensboro, Kentucky. The city officials of Owensboro, Kentucky, went to prison for over ten years rather than obey the laws of Kentucky, but still nobody went to the federal government seeking its help for the State in ironing out its own problems.

I have taken too much time of the court, I am afraid.

The Court: I think you are extremely modest, Mr. Mason, in saying that you do not understand the intricacies of the technicalities of this situation. You seem to have them pretty well in hand.

Mr. Mason: Well, your Honor, I am a little bit like a bull who has seen a red flag. I have got the drift of it.

The Court: Your execution is pretty good, too. You not only have the drift and inclination, but your execution is pretty good.

Mr. Mason: Thank you, your Honor.

The Court: It has been very interesting, but a number of these matters, of course, are academic. We are just a court [92] of the first instance, sitting here humbly, submissively. We will desire to follow authoritative pronouncements of courts of superior authority in our system, and there is quite a line of demarcation between the principle of the State in validating the contract, and that which was permitted by the government under the bankruptcy clause. Courts have passed on that, I think, decisively. Maybe they will change their minds.

Mr. Mason: Your Honor, that, to my mind, is the basic question here. Has the court passed on that decisively? Because, may I point out that in the Bekins case the court says:

> " 'The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted."

How can we reconcile that? The court has never said anything since then. They simply said in the Bekins case that no interference is permitted, under the law, and the Bekins case involved a simple demurrer with no facts.

The Court: Perhaps you can go back there some time, Mr. Mason, and argue to the Supreme Court, and they may change their views on that. But I think they have decided the [93] question in the

Bekins case without any doubt. Let us get back to the kernel of this proceeding. The court indicated before what it would do, Mr. Mason, and it is still of the same mind, that it will do that, and only that.

Mr. Mason: Yes.

The Court: You say in this petition, in concluding it:

> "Should this prayer be wholly denied, Respondent will, if left no alternative, deposit his bonds with this court, but such deposit will be without consent to jurisdiction, without prejudice and without waiving any substantive or procedural vested rights."

Of course, you could not be required to waive those anyway.

Mr. Mason: I see. But I understood if you voluntarily deposited your bonds, it was like throwing down your hand in a card game.

The Court: Of course, when you deposit your bonds here, you do so under the terms exacted by this court in its decree, that you are restrained from pursuing any further procedure with respect to those bonds.

Mr. Mason: Is it as broad as that, the restraint?

The Court: Yes.

Mr. Mason: It says only "restrained as against the District."

The Court: It will be the same as it was in the decree. [94]

I am not going to enlarge that. I am going to adhere to the restrictions that we placed upon all others who were situated as you were.

Mr. Mason: Yes; I would like to point out, your Honor, that under this Siwell v. County of Los Angeles case, cited in my first objection, my basic reason for not wishing to surrender possession of the bonds is because under that Siwell case the court held that until those bonds are actually in the possession of a District and actually canceled physically, the lien created by the taxes on the land can never be erased. Therefore, once the District gets hold of these bonds and physically cancels them, the title companies will again insure titles in the community, which I do not believe they will today.

The Court: If you accept the mandate of the court, and you will have to in order to share in this fund, Mr. Mason, I think as a safeguard the court will impound, or sequester or retain custody of the bonds which you deposit until the time for appeal elapses, and will also keep intact in its registry the moneys which are there now until that time, whereupon the proper disposition of the bonds and the money will be made.

Mr. Mason: Suppose the petitioner, the District, has not appealed?

The Court: It will have a certain length of time, under [95] the law, in which to appeal. I am not going to anticipate anything until it happens.

Mr. Mason: But if they do not appeal, then my bonds are lost, if I understand the court correctly.

The Court: If there is no appeal taken and the decree becomes final, your bonds are in the same category as the other bonds which have been sur-

rendered. There will be no difference whatsoever.

Mr. Mason: And, your Honor, because nine men consent to commit suicide—but I do not wish, certainly, to argue with this honorable court. I am grateful for its consideration. It has been a pleasure, your Honor, and whatever the court orders will have to stand, obviously. Thank you.

The Court: You will prepare an order along those lines, Mr. Downey, that the petition of the District to terminate and conclude and dismiss this proceeding from further consideration will be denied; that the bonds now held and owned by Mr. Mason will be deposited within ten days from the date of the decree; that they will be deposited in full satisfaction under the plan adopted and effectuated by this proceeding, and that at the expiration of the—does the Act fix the time for appeal, or is there a general provision?

Mr. Downey: I think it is the general provision.

The Court: Sixty days time from the entry of the decree, or, seventy-five days from the date of the entry of the decree [96] the court will then consider further disposition of the fund now in its registry, and also further dispose of the bonds deposited by Mr. Mason.

Mr. Mason: Might I inquire what ruling is made with regard to the other bonds?

The Court: I am not making any ruling on those. I am going to keep that money intact, because they are not before the court, the other bondholders.

Mr. Mason: Might it not be possible to have the

ruling with regard to my bonds and those bonds at the same time?

The Court: Well, I am not anticipating anything.

Mr. Mason: Otherwise, I am at a great disadvantage.

The Court: I am not anticipating anything at all, and I am not going to determine the rights of litigants who are not before the court. I want to make secure, as secure as possible, the retention of the funds so that the court can, if it concludes later on to do so, consider those matters.

In other words, let us assume this situation: Assume that there is some appeal from this order or decree that has just been stated, and then the Court of Appeals should take a contrary view or the Supreme Court should take a contrary view to this court. This court is desirous of retaining the status quo of this proceeding so that it can follow the mandate of superior authority. If there is, on the other hand, some review of the proceeding in the nature of an appeal, and the [97] decision of this court should be affirmed, then I want the matter in such shape so that others, who may be able to show that they are in a similar situation to the respondent, may do so.

Mr. Mason: It just seems, your Honor, that the mere fact that I did not ignore the court as the Busches have done is, under the circumstances, putting me at a disadvantage.

The Court: Where are you at any disadvantage?

Mr. Mason: Because the Busches are not required to surrender their bonds, and I am.

The Court: Before they get any of this money, they will be required to surrender their bonds, or show why they cannot do so, or where those bonds are, just exactly as you are required to do.

Mr. Mason: I wonder if Mr. Downey would be willing if the money were returned to the District, to stipulate that this entire proceeding have the same fate that the Cowan discharge had?

The Court: I do not care what Mr. Downey will stipulate to, or what he will not stipulate to. The court is not going to make any decree other than the one which it has just indicated.

Mr. Mason: Thank you, your Honor.

The Court: You will prepare it according to those lines, Mr. Downey, and serve it upon Mr. Mason, so that he can, under [98] the rule, endorse it or make such objections as he desires. You can do that within ten days?

Mr. Downey: Yes, your Honor.

The Court: Very well. Serve it on Mr. Mason.

Los Angeles, California

Saturday, December 28, 1946, 10:50 a. m.

The Court: Proceed, gentlemen. I think the court indicated, gentlemen, in its minute order just what was in the mind of the court. It related to the last paragraph of Mr. Mason's brief, the brief which was filed on November 12th.

Mr. Mason: November 21st, I believe, your Honor.

The Court: November 12, 1946.

Mr. Mason: November 12th? The last one was November 21st, I believe, your Honor.

The Court: Let me see. I may be looking at the wrong one. That is not the one. As I remember, the clerk did not put either the copy or the original in the file. Do you happen to have a copy of that last brief?

Mr. Mason: I have it here, your Honor.

Mr. Downey: Yes, I have it.

The Court: I do not want to take yours, because you may want to refer to it. I just want to refer to it now so as to get into the record what the court has in mind. The last [101] paragraph, after the argument and citation of authorities, and the discussion, concludes:

> "Wherefore, respondent prays that all the language following 'It is ordered that said petition be denied' in the proposed order be stricken, that the restraint in the final decree be lifted, on the ground that they are without warrant of law, and that the proceeding be dismissed. Should this prayer be denied, respondent requests the opportunity to present further argument, orally, before the proposed order is signed."

The court's understanding was that the court was rather specific in its directions that the relief which it suggested would be available to Mr. Mason was conditional upon his observance of the requirements that were stated in that order, and

when this final brief was received, I gathered the impression that perhaps the court was misunderstood in the matter.

Mr. Mason: If it please the court: It is submitted that no request has been made to this honorable court to order respondent's bonds surrendered. No such suggestion was contained in the petition filed by the debtor, and in the absence of any provision being shown in Chapter IX, which is the base of this proceeding, which authorizes such a request or demand, it is respondent's position that that part of the [102] decree is without support either in State or Federal law. In all of these proceedings there is no precedent known to respondent for such instruction.

Might I respectfully quote from the opinion of the United States Supreme Court in the Bekins case, which is the supposed authority for this proceeding? The court said (304 U. S. 27):

> "It should also be observed that Chapter X, Section 83(e), provides as a condition of confirmation of a plan of composition that it must appear that the petitioner 'is authorized by law to take all action necessary to be taken by it to carry out the plan,' and, if the judge is not satisfied on that point as well as on the others mentioned, he must enter an order dismissing the proceeding. The phrase 'authorized by law' manifestly refers to the law of the State."

That, it is my opinion, is the reason that the court in the Bekins case held the amended Chapter

IX not unconstitutional. In the recent case of Vanston Bondholders Committee v. Green by the United States Supreme Court about three weeks ago, found in 15 U. S. Law Week, page 4063, the United States Supreme Court had before it another bankruptcy case, which involved a claim by certain bondholders for interest on defaulted interest; not merely for their bonds and interest, but interest on defaulted interest. The court in considering [103] the matter found that New York State Courts had held that no such interest on defaulted interest was allowed, and followed the State Court decision in that proceeding. The dissenting judges, or, rather, the minority opinion in this Vanston Bondholders case, which did not disagree with the conclusion of the majority, but which pointed out that the majority opinion reached that decision from a different angle than the minority followed, in the minority opinion said this:

> ". . . To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different states shall come out with the same result because they passed through a bankruptcy court."

And: "The law that forces legal consequences to transactions is the law of the several states."

There is considerable language in both the ma-

jority and minority opinions in that case which gives very real support to the point that I am attempting to present, which is there is nothing in the State law authorizing the Merced Irrigation District to call these still outstanding bonds before their fixed maturity date, even at 100 and accrued interest. That would not be approved by any State court, would not be [104] permitted, because it is not permitted by law, and the factors legally decisive, in my opinion, are whether the bankrupt, Merced District, is authorized by the law of its creator, the State of California, to refund now at a discount the still outstanding original bonds, which bear a fixed rate of interest for terms running as long as 1961, with no provision whatever for redemption prior to maturity. Nothing in Chapter IX authorizes a bankruptcy court to order fixed maturity bonds called for payment, which are non-callable under State law.

Section 403(e) explicitly prohibits it, and these bonds do not owe their origin to any federal law, but to the borrowing power of the State of California.

In Reynolds v. Reynolds, 65 Fed. Supp. 916 the court said that Federal Courts at any stage of a proceeding must determine the existence of the elements which are essential prerequisites to invoking thir limited jurisdiction.

The California Supreme Court in Las Animas & San Joaquin Land Co. v. Preciado, 167 Cal. 580, and Universal Consolidated Oil Company v. Byram, 25 A. C. 349, said: Courts of equity do not review

the proceedings of officers entrusted with the assessment of taxation of property.

Essentially, this constitutes a review of the duties of the State taxing officials created by the Constitution of California, fixed in the laws of California, and which clearly come within the exception in the Bekins opinion, in my humble [105] opinion.

In Omaha U. S. Employees Federal Credit Union v. Brunson, 23 N. W. (2d) 717, on June 28 of this year, the court said:

> "The discharge of a bankrupt does not affect securities and they are subject to a judgment or decree in rem, but the creditor applying for such remedy may be required to await the result of the bankrupt's discharge if the bankrupt or assignee insists upon it."

Then the court goes on to say:

> "By agreement a mortgage does not convey title or vest any estate in the mortgage. It is not released by the mortgagor's discharge in bankruptcy."

It is submitted that these bonds, in legal and practical effect, reach ahead of any mortgage on 160 or 170 thousand acres within the Merced Irrigation District; that if this were a proceeding in ordinary bankruptcy, the rule applied in the Fallbrook Public Utility District v. Cowan would be applicable, that the Merced Irrigation District is merely a public trust, without pecuniary interest in the outcome of this proceeding.

There is nobody in court even claiming an adverse right; no one even claiming that a dismissal of this proceeding would impair their rights in any manner, shape or form.

In Hines v. Davidowitz, 312 U. S. 52, at page 67 the [106] United States Supreme Court said:

> " . . . Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The Supreme Judicial Council of Maine in Harvey v. Rackliffe, 41 Atl. (2d) 455, said:

> "'A contract made by the government,'"—I submit this applies, whether it is the Federal government or a State government which makes the contract—"'A contract made by the government, in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside . . ."

Then the United States Supreme Court in 322 U. S. 232, Huddleston v. Dwyer, made a most profound ruling, in which a previous final judgment of the Federal Court was set aside and annulled on the ground that subsequent to the judgment by the Federal Court the State Court had rendered an inconsistent opinion. That case involved a pro-

ceeding filed by bondholders against a city. The bondholders got judgment which became final. Subsequently the State Court of Oklahoma reinterpreted the law under which those street improvement [107] bonds had been issued. Then the bondholders asked the Federal Court some time later: Now that we have this judgment, how may we proceed to enforce it? And here is what the United States Supreme Court said:

> "A judgment of a Federal Court in a case ruled by State law, correctly applying that law as authoritatively declared by the State Courts when the judgment was rendered, must be reversed on appellate review if in the meantime the State courts have disapproved their former rulings and adopted different ones."

There is also very basic and relevant to this proceding, in my humble opinion, the opinion by the Supreme Court affirming the case of Petition of S. R. A., Inc., by the Minnesota Supreme Court, found in 18 N.W. (2d) 442, in which case the Minnesota Supreme Court said:

> " * * * The levying of State taxes upon the title" of private land holders "impairs the exercise of no federal function."
>
> "The private holders of land never enjoy tax immunity as a right but only as an incidental windfall when, and only as long as, the imposition of a State tax in some way impairs, or interferes with, a federal function."

A dismissal of this proceeding would impair no

federal [108] right, would interfere with no private right. There is no person claiming that it would. The mere fact that other bondholders may have elected to sell their bonds to the R.F.C. at a given price, or if they had decided to give them away to charity, cannot be controlling in a matter such as this.

There is a very relevant case, I believe, on that, to the effect that persons cannot grant jurisdiction to a court, that the jurisdiction of the court is determined by the statute under which the proceeding is brought. The California court in Selby v. Oakdale Irrigation District, 140 Cal. App. 171, at page 176, ruled squarely on this very same basic question, your Honor, in a case in which my counsel appeared as amicus curiae. Incidentally, after this hearing by the Appellate Court, a hearing was denied by the Supreme Court. It rose under similar circumstances. The Oakdale Irrigation District had attempted to refund its original bonds and had issued the refunding bonds excepting for perhaps $100,000 of original bonds which did not accept the refunding proposal. Then the District proceeded to levy taxes, claiming that they were levying those taxes for a special fund, the special fund to be used solely in paying the refunding of bonds, thereby attempting to squeeze the original bondholders and leave them out cold. That action by the District was challenged in the State Court, and here is what the State Court said:

> "As to the right of the parties to prosecute this action we agree with counsel that Section

> 113 (Stats. 1933, p. 800), added to the California Irrigation District Act by an Act of the legislature approved May 9, 1933, is ineffective for any purpose. Its unconstitutionality is so apparent that citation of authority seems needless."

Now, here is the point:

> " . . . It is evident that the legislature has no power to limit the right of anyone whose property interests have been invaded, to seek redress through the courts unless joined by others owning like property."

In Evangeline Parish School Board v. Kansas City Life Insurance Co. 153 Fed. (2d) 611, the Fifth Circuit Court decided a case which I believe to be directly in point. That court said: (from Syllabus)

> "The issuance of bonds, refunding at a lower interest rate, Louisiana Parish School District bonds bearing fixed rate of interest for a definite term and containing no provision for redemption before maturity, constituted an impairment of contractual obligations in violation of the Constitution."

Here an attempt is being made to call these non-callable bonds, which are non-callable under the law,—not only to call them, but to force their sale at a price accepted by [110] practically all of the other bondholders over ten years ago, without any back interest. It is an attempt not authorized by

State law. In fact, it is in violation of State law, and it is my belief that there is nothing in Chapter IX authorizing it, and that, on the contrary, Section 83(e) explicitly prohibits it.

In Public Market Co. v. City of Portland, the Oregon Supreme Court in 130 Pac. (2d) 624, rendered a very good opinion, which I believe to be squarely in point. The court said: (from Syllabus)

> "A city will not be permitted to escape liability on a contract for work performed by neglecting to levy an assessment in order to create the fund to which the contractor has agreed to look for payment of the contract price.
>
> "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure."

It is not suggested by the alleged bankrupt here that it is lacking in authority to levy the taxes required under the statute, pursuant to which this money was borrowed. There is no ceiling on the taxing power delegate by the State to this petitioner. But, in effect, if this order were to stand, your Honor, it would mean that this court is imposing a tax rate ceiling where none exists under State law.

In the case of Puerto Rico v. Rubert Co., 309 U.S. 543, an interesting case involving a land law enacted by Puerto Rico, which was to the effect

that no corporation would be permitted to hold in Puerto Rico more than 500 acres of agricultural land, and that case was bitterly attacked, the United States Supreme Court ruled that the question is purely a question of local and not of federal law.

In St. Louis Southwestern Ry. Co. v. Henwood, 157 Fed. (2d) 337, by the Eighth Circuit Court, which is the latest ruling, I believe, in composition cases, and this involved a railroad reorganization, the court said:

> "Before stockholders can participate, all of the creditors must be cared for in full."

In this proceeding, your Honor, the holders of the still outstanding original bonds are the only creditors who would be adversely affected should this proposed order be signed. All other parties would be affected the opposite of adversely. There is no one appearing, nor has anyone appeared, before this or any court in a Chapter IX proceeding involving the same state law as is involved here who has even suggested that their rigths are even on a par with the rights embodied in these bonds.

In a decision by the District Court of Appeals of [112] California, Ward v. Chandler Sherman Corporation, the court quotes from the California Supreme Court decision in the case of Raisch v. Myers, where the court says:

> "Having determined that appellant's bond is valid but that appellant's remedy by way of an action for foreclosure is barred, two questions remain for consideration in the deter-

> mination of this appeal: (1) Does the lien of the assessment continue to exist despite the fact that appellant's remedy by way of an action for foreclosure is barred? (2) If the lien of the assessment does continue to exist is appellant entitled in this proceeding, in which foreclousure is ordered to satisfy the lien of a superior lien holder, to have an adjudication to that effect and to have a further adjudication that appellant is thereby entitled to the satisfaction of said lien out of the proceeds of the foreclosure sale before any of the proceeds may be paid to respondent Myers? In our opinion, both questions must be answered in the affirmative."

And the court goes on to say, quoting from Chilson v. Jerome, 102 Cal. App. 635:

> "It is a general rule of construction that a statute having a special application controls a general one without regard to the dates of their passage and [113] that an act general in its characted will not annul the provisions of one covering a special subject, even though it seems to cover the same general ground."

Therefore, I submit that this retrospective consent by the State of California to Chapter IX proceedings does not, in words, or otherwise, say that any of the provisions of the California Irrigation District Act are thereby repealed or set aside, but it only authorizes the Federal Court to exercise such jurisdiction as is authorized by Chapter IX.

Now, Chapter IX, according to the Bekins case, is subject to State law. So that we have a very complex situation, and which is in point with where the effect fall should this proceeding be dismissed. May I quote from the hearings of last May before the House Committee on the Judiciary, when it was being agitated that this Chapter IX be made permanent legislation. This Chapter would have expired June 30th had this amendment not occurred. This is the testimony of the chief counsel of the Reconstruction Finance Corporation, the gentleman who has never been willing to appear in any of these proceedings, nor to allow the R.F.C. to appear, although attempts have been made to subpoena them, and they have contended they are beyond the reach of the court. Mr. J. Forest Campbell is the gentleman's name. His testimony appears on page 17 of the hearings upon HR-4307, dated May [114] 24, 1946, on a bill to amend Sections 81, 82, 83 and 84 of Chapter IX of the Act entiled, "An Act, and so forth," approved July, 1898, as amended. Mr. Campbell says:

> "I have been a member of the committee for a number of years, and was a member at the time that this bill was passed," meaning the amended Chapter IX.

I do not believe Mr. Campbell was with the R.F.C. at the time the original chapter IX was enacted. I am not sure about that. But he means this bill, Sections 81, 82, 83 and 84 of what I believe was the old Chapter IX. He says:

> "I agree with the statements of Parkhurst regarding notice to landowners, for the reason that these proceedings are instituted for the benefit of landowners. They are the only parties who are taxed, and are the only ones who receive benefits from the proceedings."

That, I submit, is rather conclusive. A District receives no benefit from this proceeding. The District is without pecuniary interest. It is merely a public interest, whether the District obeys the law and collects the taxes or not, as required by the Constitution, and the laws of California will not interfere with any right of the Tax Collector. A tax collector ordinarily is not allowed to exercise discretion in the collection of taxes where that collection is made mandatory under the law. This is a case, in effect, where [115] public tax collectors, state tax collectors, are asking this court for permission to violate the laws of their sovereign. I cannot bring myself to believe that that was the intention of the United States Supreme Court in holding Chapter IX not unconstitutional.

In my original request dated October 26, your Honor, I prayed this honorable Court:

> "Wherefore, petitioner respectfully submits that the bonds and past due coupons held by him, as listed in his proof of claim, are in no instance and under no law 'barred by the Statute of Limitations' " and so forth.

That is the brown-covered one there, I believe; the

last page of the one dated October 26. I believe it is in a cover like this one, your Honor.

The Court: Yes, I have that, but it does not seem to have the same file mark.

Mr. Mason: I thought it might be identified by the clerk on the cover.

The Court: October 25th.

Mr. Mason: October 26th, this is dated.

The Court: This is headed, "Objections of J. R. Mason (a creditor) to the Petition."

Mr. Mason: That must be it.

The Court: Yes. It is dated at the end October 26th, but [116] is marked Filed October 25th. There must be some little discrepancy there.

Mr. Mason: Yes. In the closing paragraph, your Honor, I request the court as follows:

> "Wherefore, petitioner respectfully submits that the bonds and past due coupons held by him, as listed in his proof of claim, are in no instance and under no law 'barred by the Statute of Limitations', and prays that the funds now with the Registrar be not given to the Bankrupt who has no right to that money, and prays that the restraint referred to in paragraph IV be stricken from the decree, and that this Honorable Court leave to the Courts of California the matter of fixing the rights of the parties involved, and that the proceeding brought under 11 U.S.C.A. 401-403 be terminated."

My prayer at present is unchanged from that.

If I did change the substance of it in the final prayer, it was an oversight, your Honor, but this court having ruled that the statute of limitations is inapplicable to these bonds, on the strength of the California Supreme Court ruling, and the Seventh Circuit Court of Appeals in another composition proceeding, which held that the purpose of the proceeding was to avoid administration in bankruptcy and to free property from the jurisdiction of the Bankrutpcy Court, and which quotes [117] from 289 Federal 732, saying:

> " . . . Only when the composition is not confirmed"— I think this is quite important, your Honor— "Only when the composition is not confirmed shall the estate be further administered in bankruptcy; and this court has held that with the signing of the order of confirmation the bankruptcy court loses jurisdiction."

Now, whether that rule should apply equally in this proceeding, I would not presume to suggest to your Honor, other than to point out that it appears to be the rule that when the final decree has been signed in a proceeding of composition that the court is without further jurisdiction.

In this case jurisdiction appears to be reserved for one purpose, and one purpose only, and counsel for the District made it very clear. They said in their letter to this honorable Court, dated November 12, 1946, "However, we do not make our case upon that order." That is the order in which

the court said, in effect, upon the expiration of the statute of limitations they might report back to the court for such action as to it was then deemed wise, and they conclude that sentence by saying, "by virtue of which we claim that the court cannot exercise discretion in the premises, but can only apply the law as it exists."

Your Honor, I adopt that sentence as my own. I submit [118] that under the decision in the Bekins case that it is the State law which is controlling, and the fact that nothing in the State law authorizes the redemption of these bonds prior to their maturity, even at full accrued interest, let alone at about 30 per cent of the value of the claim, because the value of these claims today with the 12 years defaulted interest, your Honor, is over $1,500 per bond versus a proposed payment of $500.

In case your Honor has never seen one of these bonds, perhaps he would be interested in the State certificate which is affixed to the bond, and which makes these bonds irrevocably a lawful investment for all trust funds, all savings banks, all insurance companies, and lawful for any funds which may be invested in State of California bonds; and irrespective of anything this court may do, these bonds will remain lawful investments for savings banks, under California law.

So we would have the interesting paradox of State bonds which the Federal Court says are in a category, say, of confederate money, but still are legal tender within the State. May I read the State controller's certificate on this bond:

"Sacramento, California, October 6, 1924.

"I, Ray L. Riley, controller of the State of California, do hereby certify that the within bond, No. 10860 of First Issue, Fourth Division, of the Merced Irrigation District, issued January 1, 1922, [119] is, in accordnace with an Act of the Legislature of California, approved June 13, 1913, a legal investment for all trust funds and for the funds of all insurance companies, banks, both commercial and savings, and trust companies, the State School funds and any funds which may be invested in County, municipal or school district bonds, and it may be deposited as security for the performance of any act whenever the bonds of any county, city, city and county, or school district may be so deposited, it being entitled to such privileges by virtue of an examination by the state engineer, the attorney general and the superintendent of banks of the State of California in pursuance of said Act. The within bond may also, according to the Constitution of the State of California, be used as security for the deposit of public money in banks in said State.

"Signed Ray L. Riley,
"Controller of State of California."

It is submitted that this certification by the State is unqualified. It is not subject to revocation, and these are the only bonds ever issued in the State of California. I don't mean the Merced Irrigation

District, but bonds issued under this Irrigation District law are the only bonds carrying such an irrevocable State endorsement. This bond calls for a fixed [120] maturity of 1961. There is no provision even hinted that there is anything in the law authorizing its redemption before that date, and even if the District were to try to raise money to pay off this bond today, it would not be allowed under the law to levy the taxes to pay this bond. Those taxes may not be levied until 1960. The District cannot levy taxes now to meet contracts payable in 1961. The taxes have not been levied to satisfy this bond. And if there is one thing that is fundamental in municipal bond contracts, it is that the holder of the municipal bonds has the right to the honest execution of the laws under and pursuant to which the contract was issued. Here is a case where no attempt has been made to levy the taxes. There is no claim they cannot do so.

Furthermore, may I point out to your Honor that this species of taxes is distinguishable from other species of taxes, and has a different economic effect. This species of taxes never takes anything from a land user as a user of land, but only takes from what would otherwise be capitalized into speculative prices for land titles. This kind of a tax is a diametrical opposite of a species of tax based upon ability to pay. This tax would tend to reduce land speculation. May I quote from a rather well-known man named Herbert Spencer, who said in a famous book, "Social Statics":

> "Meanwhile, we shall do well to recollect that there are others besides the landed class to be [121] considered. In our tender regard to the vested interests of the few, let us not forget that the rights of many are in abeyance, and must remain so, as long as the earth is monopolized by individuals . . . We find that if pushed to its ultimate consequences, a claim to effective possession of the soil involves a land-owning despotism. And we find lastly, that the theory of co-heirship of all men to the soil is consistent with the highest civilization; and that, however difficult it may be to embody that theory in fact, equity sternly commands that it be done."

Here is a proposal which would only result in creating unearned increment to those not locally entitled to such a windfall. And irrespective of whether 99 per cent of the other investors in these bonds decided to accept the R.F.C. price or give their bonds away cannot change the fundamental question.

In In re Anthony, 42 Fed. Supp. 312, the Court said: (from Syllabus)

> "Generally, effect of bankrupt's discharge on particular debt is determined in plenary action brought in court other than bankruptcy court by creditor to enforce debt against discharged bankrupts, and an essential part of trial of such action is a [122] determination of effect of discharge when pleaded by bankrupt as an affirmative defense."

Citing Federal Rules of Civil Procedure, Rule 8(c), 28 U.S.C.A. following Section 723(c) (Bankruptcy Act Chapter 14, 17, 11 U.S.C.A. Sections 32 and 35.)

A case involving a similar conflict of authority between Federal and State powers was involved in Federal Deposit Insurance Corporation v. George-Howard, decided in 55 Fed. Supp. 921, where the court said: (from Syllabus)

> "A proceeding by Federal Deposit Insurance Corporation to recover from assets of State Bank . . . did not 'arise under the laws of the United States', and District Court was without jurisdiction thereof, notwithstanding statute providing that suits to which corporation is a party should be deemed to arise under laws of United States."

Judicial Code Section 24.(1)(a), 28 U.S.C.A. Section 41(1)(a); 12 U.S.C.A. Section 264(j).

> "A Federal Court does not have jurisdiction of suit merely because statute provides that suit shall be deemed to arise under laws of the United States, since question of whether given controversy arises under a law of the United States is a 'judicial question.' "

The court held that a State Bank, being organized under [123] the laws of the State, that its claims against the State Bank would have to be settled in the State Courts.

Now, if that be true of a State Bank, how much

more must it be true of a State taxing authority, which has been delegated the sovereign power of the State to tax land, which is perhaps the highest exercise of sovereignty.

May I close by praying that the prayer embodied in this October 26 petition be granted, as requested in the last paragraph.

With regard to the request that the restraint embodied in the final decree be lifted, I shall not—I am searching for the best word—either that restraint is authorized by Chapter IX, or it is not authorized by Chapter IX. It is the view of the best advisers with whom I can make contact that Chapter IX does not authorize a restraint in the final decree, that a restraint is authorized only in the interlocutory decree, and that Chapter IX does not contain any provision for incorporating restraint in the final decree. As to the final decree, the parties are, in my opinion, to be left in the State Court to determine the actual rights under the composition. Congress did not mean, and Congress gave this honorable Court no jurisdiction over the bankrupt. This court can issue no order involving the bankrupt unless the bankrupt accepts such order in writing. The bankrupt has a veto power. I hate to bring the Soviet veto power in here, [124] but the bankrupt has a veto power at every stage of the proceedings.

Did Congress intend it to have only that veto power? If so, it would be completely contrary to all of the precedents. Here is a case where it is not I who owes money to the bankrupt, but the

other way around. Does jurisdiction lie in this court over the creditor to a greater extent than it exists with respect to the bankrupt? Can it only be that this court has jurisdiction to compel performance from the creditor, but has no power to compel performance from the debtor?

Chapter IX is very, very explicit in that regard, as your Honor, of course, knows. It provides exclusively in sub-section (e), where it says:

> "Provided, however, that the plan, as changed or modified, shall comply with all the provisions of this Chapter, and shall have been accepted in writing by the petitioner."

Therefore, any change in the final decree or any change in the plan of composition, as submitted to the court, cannot be made without the consent in writing of the petitioner, and such an order as is proposed would be a departure from anything requested in the plan presented to the court.

Surely the time has not come when it is unlawful to invest in and hold bonds of the State of California, or one of its [125] lawfully constituted subdivisions; bonds which are completely immune from federal income taxation. The controlling decisions, your Honor, today are to the effect that if the federal courts would deprive us of even five cents of interest payable under those bonds that would be repugnant to the Constitution. But here it is not only to deprive us of five cents, but of all of the interest and 50 per cent of the principal.

I will close by urging that there is no one claim-

ing that a compliance with this prayer would impair their rights.

The Court: I will hear from you for a very few minutes, Mr. Downey. We have already consumed 55 minutes.

Mr. Downey: Yes, your Honor. I can be very brief.

If the court please, the court's decision in this matter was that there was no applicable legal statute of limitations applying, as we contended, but that that situation was to be governed by principles of equity. I think the court fully recognized that it cannot compel Mr. Mason to surrender his bonds and accept the composition rate, and I think it so stated. I think the court's opinion was that Mr. Mason had consented to do so. Evidently that is not the case, and that being so, I would like to propose an order or a decision which fully embodies the court's feeling in this matter, which is thoroughly supported by law and definitely meets Mr. Mason's objections, although perhaps will not meet with his [126] approval.

I would like to propose that an order could be very feasibly and properly entered, requiring the bondholders to surrender their bonds, say, within 30 days and accept the money at a composition rate, or in the event they do not do so, that the money revert to the District. Just such a provision has been amply sustained and upheld by the higher courts, and in three cases reviewed by the Supreme Court, when it denied certiorari. In those cases, of course, a year was allowed from the time of the

final decree, and if in the year the bondholders did not accept the money at the composition rate and deposit their bonds, the money was to revert to the District or to be used for the District's interests.

We would like to propose that the court could now very feasibly direct that in a period of time, let us say, 30 or 60 days that such be done, and if it were not done, that the money then revert to the District. We think that could be done with regard to all of the bondholders. The court would undoubtedly desire to provide that personal notice or personal service of notice of that be served upon the other bondholders besides Mr. Mason, which, if it is possible to be done, we could arrange to do.

In that regard I would like to mention to the court that since the last hearing we have again attempted to get in touch [127] with these other bondholders and have not been successful. The attempts were by phone, however, and undoubtedly they could be contacted personally. There is one unknown bondholder here. I might point out that bond matured in 1940, and even were the composition proceedings not proper, they would be barred now by the statute of limitations. Of course, no notice could be given there.

I think, therefore, that a rather feasible solution to the situation, as it now exists, could be met by such an order, that the bondholders accept the composition rate and surrender their bonds within a specified time, or, in the event they do not do so, the money then revert to the District. Mr. Mason's position is that he desires the proceedings termin-

ated and desires our petition denied in all respects. We, of course, take the position that the proceedings cannot be terminated with the money in the registry of the court unclaimed either by the District or by the bondholders. The court cannot feasibly terminate the proceedings and just leave that money sitting there. So I submit that the course proposed by us would meet with that objection and would eventually lead to a termination and winding up of this proceeding. We further submit that is in line with the court's opinion in the matter, and would be a feasible order and a proper one in this instance.

The Court: I will give you five minutes in which to reply, [128] Mr. Mason.

Mr. Mason: If it please your Honor: The suggestion that this procedure had met with approval in previous proceedings is slightly inaccurate. The first test of this idea of their being called, say, by 2:00 o'clock on Tuesday or get nothing, arose in the Anderson-Cottonwood case, and counsel in that case raised the point but did not argue the point in the brief, whereupon the Circuit Court of Appeals ruled they would not consider the point. The next case that came along involving the same situation, I believe, was the Palos Verdes Irrigation District case, where the Circuit Court of Appeals, in error, said they had already ruled on the point in the Anderson-Cottonwood case. That is the origin of the belief that this procedure has been sanctioned, and I believe it stems from a false base.

Might I ask counsel for the District if under his

proposal he would be willing to have the restraints now embodied in the final decree stricken?

Mr. Downey: We, of course, would not. The final decree we feel is accurate and legal as it stands, and we will cite three cases which we feel unquestionably rule that the court can fix a specific time limit as the time in which the bondholders can claim their money, and in the event they do not so claim, it is to revert to the District, or, as in one of the cases, it is to revert to the Reconstruction Finance [129] Corporation for the benefit of the District. It is my opinion that those decisions are thoroughly determinative of this situation and clearly authorize it, and hold such provision to be legal. In all three of those cases certiorari has been denied by the United States Supreme Court, and rehearings were denied by the United States Supreme Court in all three cases, also.

Mr. Mason: May I point out, your Honor, that the originally proposed final decree submitted by this District contained a limitation of one year, which was stricken from the final decree. It is rather late in the day for petitioner to come in now and request that the final decree be now amended to correspond to the original proposed final decree, which was amended with petitioner's consent, and in which the provision for a time limitation was stricken. It is just as late to amend the decree today in that respect, as it would be at any other, in my opinion, and either that final decree became final, or it is subject to revision. If it is subject to revision now in any respect, I submit that the argu-

ment which I have submitted should be given consideration by this honorable court on the point that there is no authority in the petitioner to now execute the plan, when the carrying out of that plan involves the violation of the State law.

Mr. Downey: Could I just say this?

Mr. Mason: Just one second. [130]

The objections to the proposed final decree, dated July 9, 1941 state:

> "Said creditor objects to that part of the proposed Final Decree which provides a period or time limit of twelve months for presentation of outstanding old obligations to the Clerk of this Court as Registrar for payment pursuant to the Plan of Composition, and objects to any time limit for such presentation becoming a part of the Final Decree, and objects to that part of the Final Decree which would bar from participating in the Plan of Composition if not presented within a period of twelve months, or any period of time."

In the proposed final decree it was proposed to delete the provision which petitioner now wishes to insert, which we submit this District——

Mr. Downey: Just a moment. We do not intend to propose that the final decree be revised or altered. The final decree provides that upon the running of the statute of limitation to those still outstanding obligations, if any, has run, the petitioner "may so report to this Court for such further action respecting said money remaining in the hands of the

Registrar as this Court may determine to be proper and for the final closing of this proceeding."

It is pursuant to that language that we now make application [131] for such a direction, and we think that a direction that the money be taken within a specified period adequately falls within that language, is equitable and is actually supported by legal authority, and that some such provision must necessarily be necessary at some stage of the proceedings, so as to eventually terminate this matter in one way or another.

Mr. Mason: May it please your Honor——

The Court: I do not care to hear any more, gentlemen. I have been listening to you for an hour and fifteen minutes now. The court has throughout these proceedings, from their inception way back in 1939, in several instances rendered its opinions, and in others has stated the outcome in minute orders, when appropriate, has approved forms and signed orders, when requested.

In the findings of fact and conclusions of law made February 21, 1939, reference, of course, was made to the memorandum opinion of the court filed January 10, 1939. In that opinion the court, in pari materia, stated:

> "This bankruptcy proceeding was filed in this court June 17, 1938.
>
> * * * *
>
> "The constitutional power of Congress to establish 'uniform laws on the subject of bankruptcies throughout the United States' is paramount to powers of the States and it is firmly

> established in the United States [132] that the 'subject of bankruptcies' is nothing less than the subject of the relations between an insolvent or nonpaying debtor and his creditors, extending to its or their relief."

Citing Continental Bank v. Rock Island Railway, 294 U.S. 648.

> "And when the jurisdiction of the Federal Court is constitutionally invoked under an existing Act of Congress relating to the subject of bankruptcy, as it has been in this proceeding, it is exclusive of all other courts; U. S. Fidelity, etc., Co. v. Bray, 225 U.S. 205; and particularly is this the case when, as here, the State Court has not proceeded to the making of any findings of fact or to the entry of any decree adjudging or purporting to adjudge rights.
>
> "A court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

Citing Isaacs v. Hobbs Tie & T. Co., 282 U.S. 734; Moore v. Scott (C.C.A.9) 55 F. (2d) 863; In Re A. C. Wagy & Co. (C.C.A.9) 20 Fed (2d) 638.

> "We think that the State Court proceeding from any point of view is wholly immaterial to this bankruptcy matter." [133]

Thereafter, pursuant to the opinion, findings of fact were made and signed by the court and entered in the proceeding.

The conclusions of law stated therein, and indicated by the document to which I have already adverted, dated February 21, 1935, read as follows:

"CONCLUSIONS OF LAW"

> "As Conclusions of Law from the foregoing facts, the Court finds and concludes that petitioner, Merced Irrigation District, is entitled to an interlocutory decree and judgment approving and confirming said plan of composition as proposed and presented and contained in said petition and that said plan of composition and said decree of confirmation shall become and be binding upon all creditors affected by the plan if within the time prescribed in said decree or such additional time as the judge or the law may allow, the money to be delivered to the bondholders under the terms of the plan shall have been deposited with the court or such depository as the court may appoint or shall otherwise be made available for the bondholders affected by the plan. That thereafter upon compliance with the interlocutory decree petitioner shall be entitled to a final decree as provided by law."

The interlocutory decree was entered, and thereafter [134] further decrees and judgments were entered.

In the interlocutory decree, dated February 21, 1939, the following is the concluding paragraph:

"That any and all holders of the outstanding bond indebtedness of petitioner district be and are hereby enjoined, pending the entry of final decree herein, from attempting the enforcement or collection of any claim, judgment or lien, by legal proceedings or otherwise, which they may have against petitioner or against any of the lands situated within petitioner district and held by individuals."

Then in the decree which was entered later—I don't know if the final decree is in this file, Mr. Clerk.

The Clerk: It should be, your Honor.

The Court: You think it is in the file?

The Clerk: Yes.

Mr. Mason: I have a copy of the final decree, your Honor.

The Court: The files are somewhat mixed up, I ascertained from looking at them sometime ago.

Mr. Mason: I believe this is a copy, if you wish to refer to it.

The Court: In the final decree, among other matters determined therein, the following appears:

"2. That the sum of $54,506.95 paid to the Clerk of this Court as Registrar herein by said [135] disbursing agent be disbursed by the Registrar for the purpose of taking up and retiring, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of petitioner as are affected by the plan of composition and

which may be presented to the Registrar for that purpose. One year after date of entry of this decree and annually thereafter until otherwise ordered by the Court, Merced Irrigation District shall submit herein a report showing the obligations affected by the plan of composition which have been taken at the composition rate during such year and the Registrar shall likewise, at least once a year, submit a similar report of bonds taken up and the balance, if any, of money remaining in his hands. If any money shall remain in the hands of the Registrar after petitioner claims that the Statute of Limitations applicable to its still outstanding obligations, if any, has run, petitioner may so report to this court for such further action respecting said money remaining in the hands of the Registrar as this Court may determine to be proper and for the final closing of this proceeding.

"3. That except as provided in paragraph 2 hereof, all the old bonds and other obligations of [136] petitioner affected by the plan of composition approved herein whether heretofore surrendered and cancelled or remaining outstanding and by whomsoever held are hereby cancelled and annulled. That the holders of said bonds be and they are hereby permanently and forever restrained and enjoined from asserting any claim or demand whatsoever thereon as against petitioner district or its offi-

cers or against the property situated therein or the owners thereof."

* * * *

"5. That petitioner has made available within the time and manner prescribed by the interlocutory decree herein all money and consideration to be delivered to creditors under the plan of composition approved in said interlocutory decree and in full compliance with said interlocutory decree and Chapter IX of the Bankruptcy Act. That all acts and proceedings required to be taken by petitioner under the terms of the plan of composition approved in this cause and the interlocutory decree have been duly and regularly had and taken and petitioner has duly and regularly complied with all requirements of Chapter IX of the Bankruptcy Act of the United States and with all orders of the court pertaining to it herein. That said plan of composition is binding upon [137] all creditors affected by it whether secured or unsecured and whether or not their claims have been filed or evidenced and if filed or evidenced whether or not allowed, including creditors who have not, as well as those who have, accepted it.

"Petitioner, Merced Irrigation District, is hereby discharged from all debts and liabilities dealt with in the plan of composition approved in the interlocutory decree herein."

The history of this instant proceeding is also reflected by the files of the court, and on June 2nd, 1941, the following order was made, as far as it is applicable here:

> "Upon reading and filing the Report and Account of E. E. Neel, as Disbursing Agent herein under and pursuant to Interlocutory Decree dated February 21, 1939;
>
> "It Is Ordered, that the sum of $54,506.95 tendered by said E. E. Neel, as Disbursing Agent, with said report and account, be accepted by the Clerk of this Court as Registrar and thereafter held and paid by him to the holders of outstanding bonds of petitioner above named in accordance with Interlocutory Decree herein dated February 21, 1939, and such further or other decrees and orders of this court as may be made herein." [138]

The fund was accordingly lodged, and was diminished by other payments that were directed to be made therefrom from time to time to those whom the court concluded were entitled to receive them.

Finally, the matter came on for further proceedings under the petition of the Merced Irrigation District, in which the allegations were made, substantially, that under any construction of statutes of limitation the period of limitation had expired, and that the matter should be determined by an appropriate order with respect to those funds still remaining in the registry. That matter came on after notice, and Mr. Mason appeared in propria persona.

The court concluded at the time that further time should be given so that the fullest measure of equity under the law might be available to those whose bonds and obligations were involved in this com-

position and in this bankruptcy proceeding brought pursuant to Chapter IX of the Act.

On October—the date is not stated in this carbon copy of the minute order, but I believe it was October 29, 1946, according to some red lead pencil writing on this proposed order—the following minute appears:

> "This matter coming on for hearing on petition of Merced Irrigation District for disbursement of funds, filed July 30, 1946, pursuant to notice of hearing filed August 20, 1946, and objections of [139] J. R. Mason to said petition, filed October 28, 1946; Stephen W. Downey and John Downey, Esqs., appearing for the Petitioner; J. R. Mason, a creditor, appearing in propria persona."

I will not read some matter that is simply descriptive of further appearances, but it closes with the following paragraph:

> "The Court propounds a question to Mr. Mason as to whether he is willing to accept his money on the same parity as the other bondholders. Mr. Mason asks for 15 days' time to answer, and the court orders this matter continued to November 15, 1946, at 10:00 A.M. for further proceedings on this phase of the matter."

Then on November 15, 1946, the following appears in the file as the clerk's record of the proceedings on that day:

> "This matter coming on for further hearing

on Petition of Merced Irrigation District for disbursement of funds, filed July 30, 1946, pursuant to notice filed August 20, 1946, and on objections of J. R. Mason, filed October 28, 1946, thereto; Messrs. Downey, Brand & Seymour, by Stephen M. Downey, Esq., appearing as counsel for the petitioner; J. R. Mason being present in propria persona; on motion of Attorney Downey, and with consent of respondent [140] J. R. Mason, it is ordered that the following documents be considered as evidence on this hearing; Interlocutory Decree and Appeal therefrom; Final Decree and Appeal therefrom; Objections of J. R. Mason to Final Decree; the herein petition; Order for Notice on this Petition; Notice of Hearing this Petition; and Proposed Final Decree and objections thereto.

"Attorney Downey and Respondent Mason argue, and it is ordered that the petition herein is denied; that the bonds now held and owned by Respondent Mason be deposited within ten (10) days from date of the Decree made pursuant to this hearing; that they will be deposited in full satisfaction under the plan adopted and effectuated by this proceeding; at the expiration of 75 days from the date of entry of said decree, the Court will then consider further the disposition of the fund now in its Registry and also will further consider disposition of the bonds deposited in the registry; Decree to be prepared by Attorney Downey within ten (10) days from this date."

Thereafter counsel for the petitioner submitted a proposed form, and action thereon was withheld, and on the 14th of December of this year, the following proceedings appear, as [141] are reflected by the file:

> "On the consideration of the proposed order relating to the action of the Court pursuant to proceedings of November 15, 1946, and of the objections of Respondent, J. R. Mason, to said proposed order filed herein November 22, 1946, the court is in doubt because of the statements in the last sentence of the objections of Respondent to the order proposed by Petitioner as to the attitude and position of Respondent, J. R. Mason, and therefore, in order to finally and decisively ascertain the attitude of said Respondent, J. R. Mason, and in conformity to his request in said objections of Respondent to the order proposed by Petitioner, it is now ordered that said Respondent and Petitioner Merced Irrigation District appear before this Court in courtroom No. 8, United States Post Office and Court House, Los Angeles, California, on Saturday, December 28, 1946, at 10:00 o'clock A.M., for further and final proceedings in the matter of the Petition of the Merced Irrigation District filed herein July 30, 1946. The clerk is directed this day to transmit notice hereof by U. S. mail to Petitioner Merced Irrigation District and to Respondent, J. R. Mason."

It now appears that the court misapprehended

Mr. Mason's [142] attitude in the premises, and it now appears, and the court finds, that respondent Mason is not willing to comply with the suggested direction of the court, as indicated by the record.

The court further concludes that laches have occurred, and that there has also been sufficient time under any applicable statute of limitations for the determination of the money remaining in this fund.

The court concluding that it had jurisdiction over its fund, and it is the fund that is in question in this proceeding at this time, I would not be inclined to accept the suggestion of counsel for the District because of a desire to afford to those bondholders, including Mr. Mason, the opportunity to share in this money in preference to the Merced Irrigation District. But it must be done on the basis of the court's direction and not upon any other theory. Apparently, that is not satisfactory to Mr. Mason, so that counsel for the District will prepare an order along the lines suggested in his argument, and present that for signature, and it will be signed.

You may have an exception, Mr. Mason.

Mr. Mason: May it please the court: I had understood the court had ruled at the last hearing in this case that counsel had failed completely to establish the point that any statute of limitations was applicable to the still [143] outstanding bonds, and that the court decided against the petitioner on that point, and also decided that petitioner had no equity interest in the funds on deposit in the registry of this court.

The Court: You will prepare the decree, Mr.

Downey. If you can present it before December 31st, I should like to have it, as I should like to have this matter closed so that we can report it during this year as a closed case in this court.

Mr. Mason: Might I also point out that these other bondholders, having had no notice of this proceeding, and this proceeding being entirely beyond the petition filed with this honorable Court by petitioner, the petition of July 24, 1946, the sole request there being:

> "Wherefore, petitioner prays that the unexpended funds in the hands of the Registrar, to-wit, Thirty-Two Thousand Eight Hundred Eleven and 59/100 Dollars ($32,811.59), be paid by said Registrar to petitioner and this proceeding finally terminated and closed."

I submit that was the only prayer about which any notice was given to these other bondholders, and I submit to your Honor that before there is any such drastic device as forfeiture invoked against them, it would seem to require their being given notice and proof of notice. But I demur on this ground, your Honor, that under the controlling decisions, with [144] all due respect to the ruling by this Honorable court, the still outstanding bonds of this district come under the heading of non-dischargeable obligations under other provisions of the Bankruptcy Act, prohibiting the court from interfering with the collection of taxes. I appreciate this court's patience. This is a hard case; a very hard case. It involves plowing new fields of law from the traditions.

The Court: Mr. Mason, I want to ask you one question. Do you have any authority to appear for anybody excepting yourself?

Mr. Mason: No.

The Court: Very well, so long as the reporter got your answer. I understood you to say, "No."

Mr. Mason: I definitely do not have, your Honor. I do not even know these other bondholders, and have never met them or talked with them in my life. But when I first appeared, I tried to appear not only on my own behalf but others similarly situated; not that I have their authority to do so, but I was formerly in the investment banking business and distributed these bonds originally in large measure. I believed in them.

This has been a very, very interesting case. I might add that the Tax Court originally passed on the original Chapter IX, your Honor, and said that it was beyond the power of Congress. The Circuit Court of Appeals reversed the District [145] Court; then the United States Supreme Court reversed the Circuit Court of Appeals. In other words, I am not convinced that the last word has been said on this question by the United States Supreme Court. I would like for the United States Supreme Court to have another opportunity to clarify this, because there is a question of sovereignty here, and I do not believe it was the intent of that court to allow Federal Courts to permit State taxpayers to escape paying State taxes. That would not be any more consistent than it would be to allow State courts to

permit Federal taxpayers to escape the payment of Federal taxes.

I do appreciate this court's great indulgence and patience, because I know this is a hard case. I do wish to file an exception to the order, as proposed.

The Court: You may have an exception. [146]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of February, A.D. 1947.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: No. 11554. United States Circuit Court of Appeals for the Ninth Circuit. J. R. Mason, Appellant, vs. Merced Irrigation District, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed February 28, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 11554

J. R. MASON,

Appellant,

vs.

MERCED IRRIGATION DISTRICT,

Appellant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant hereby designates as the Statement of Points on which he intends to rely in this Appeal the "Statement of Points on Appeal" which is included in the Transcript of Record on Appeal prepared by the Clerk of the U. S. District Court and filed herein on or about February 28, 1947.

Dated, March 5, 1947.

/s/ J. R. MASON,
Appellant in Pro se.

[Endorsed]: Filed Mar. 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The appellant designates the following as those parts of the record on appeal as necessary for the consideration of the points upon which he intends to rely in this appeal:

1. Petition of Merced Irrigation District dated July 24, 1946.

2. Objections of J. R. Mason to Petition, dated October 26, 1946.

3. Letter dated November 12, 1946, to Judge McCormick from Downey, Brand & Seymour, counsel for petitioner.

4. Minute Order Entered November 15, 1946.

5. Order (Proposed) Denying Petition, directing J. R. Mason to surrender his bonds, dated November, 1946.

6. Objections of J. R. Mason to Order proposed by petitioner, filed November 22, 1946.

7. Decree, Order and, Filed and Entered December 31, 1946.

8. Order Staying Execution of Decree of December 31, 1946.

9. Stipulation re Use of Records in Other Appeals.

10. Notice of Appeal from Decree dated December 31, 1946.

11. Bond for Costs on Appeal.

12. Names and Addresses of Attorneys.

12-a. Also Clerk's Certificate.

13. The following portions of Reporter's Transcript:

Page 2, all, to page 4, line 11.

Page 20, line 7, to line 25, both inclusive.

Page 22, line 7, to line 15, inclusive.

Page 33, line 2, to page 35, line 20.

Page 36, line 23, to page 37, line 14.

Page 41, line 15, to page 45, line 15.

Page 62, line 14, to page 64, line 25.

14. Statement of Points and Assignment of Errors.

15. Designation of Contents of Record on Appeal.

16. Certificate of Clerk of U. S. District Court to Transcript on Appeal.

Dated March 5, 1947.

/s/ J. R. MASON,
Appellant in Pro Se.

[Endorsed]: Filed March 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF PORTION OF RECORD TO BE PRINTED

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Merced Irrigation District, Appellee herein, by its Counsel and pursuant to Section 6 of Rule 19 of this Court files this designation of the additional portions of the transcript of record herein which shall be contained in the printed record:

Affidavit of Compliance by Debtor with Requirements of Order and Decree.

Affidavit of Mailing of Notice of Hearing (Robert G. Giessler).

Affidavit of Publication in Merced Sun-Star.

Affidavit of Publication in The Wall Street Journal.

Decree, Final, Discharge and Order Settling Report and Account of Disbursing Agent dated July 15, 1941.

Decree, Final, Discharge and Order Settling Report and Account of Disbursing Agent, Proposed, dated 1941.

Decree, Interlocutory, dated February 21, 1939.

Minute Order Entered October 29, 1946.

Minute Order Entered December 14, 1946.

Minute Order Entered December 28, 1946.

Notice of Appeal from Final Decree dated July 15, 1941.

Notice of Appeal from Interlocutory Decree.

Notice of Hearing of Petition of Debtor.

Notice of Hearing to be held on December 28, 1946.

Objections to Proposed Final Decree dated July 9, 1941.

Order fixing October 29, 1946, for hearing Petition of Debtor.

Return of Service by Marshal of Order and Decree.

Reporter's Transcript of Proceedings on October 29, November 15 and December 28, 1946:

Page 18, line 11, to page 20, line 7, and concluding with ". . . I have followed them."

Page 21, line 10, to page 21, line 25.

Page 45, line 24, to page 55, line 14.

Page 67, line 20, to page 99, line 4.

Page 101, line 9, to page 146, line 15.

Dated: March 8, 1947.

DOWNEY, BRAND,
SEYMOUR & ROHWER,
/s/ JOHN F. DOWNEY,
Attorneys for Appellee,
Merced Irrigation District.

No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON,
Appellant,

vs.

MERCED IRRIGATION DISTRICT,
Appellee.

BRIEF FOR APPELLANT.

J. R. MASON,
1920 Lake Street, San Francisco,
Appellant Pro Se.

FILED

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PAUL P. O'BRIEN

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No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON, *Appellant,*
vs.
MERCED IRRIGATION DISTRICT, *Appellee.*

BRIEF FOR APPELLANT.

STATEMENT REGARDING JURISDICTION.

The District Court.

This action was commenced by the filing of a petition by Merced Irrigation District, on July 23, 1946. (R. 30 to 40.)

The action was at law in respect of $32,811.95 in the custody of the District Court.

Appellee bases this case "upon statutory and substantive rules of (State) law", and insists that "the court can not exercise discretion in the premises but can only apply the law as it exists." (R. 55.) There was no dispute between the parties that State law and decisions govern and control the crucial point in this action.

Appellant objected to jurisdiction by the District Court, and requested "that this Honorable Court leave to the Courts of California the matter of fixing the rights of the parties". (R. 43.)

The District Court denied the petition of the district in its minute order of November 15, 1946. (R. 57.) This order was not signed, because objections were filed by appellant to certain discriminatory provisions in the proposed order and decree. (R. 59.) The minute order of November 15 was reversed and the petition was allowed by the District Court December 31, 1946. (R. 76.) Notice of appeal was filed January 22, 1947. (R. 84.) With bond for costs on appeal. (R. 84.)

The jurisdiction of this Court to entertain said appeal is the following. Judicial Code, Section 225, Title 28, sub. (a). Sections 24 and 25 of the Bankruptcy Act of 1898, as amended June 22, 1938. (11 *U.S.C.* Sections 47-48.)

Appellant, who owns and holds certain original bond obligations issued by Merced Irrigation District, is a creditor whose claim was duly filed, and whose bonds are among the "still outstanding obligations" expressly recognized as such in the final decree of July 15, 1941. (R. 26.)

STATEMENT OF THE CASE.

In this brief Merced Irrigation District will be referred to as the "appellee" and the appellant who was respondent below will be referred to as "appellant".

Appellee is a political subdivision of the State within the meaning of 26 U.S.C.A. § 1065(b). (72 Op. Atty. Gen. 38, February 4, 1937.) It has had confided to it the sovereign power of the State of California to levy unlimited direct annual ad-valorem assessments on land, and the duty to enforce their collection according to law, and to administer all tax revested land within its boundaries, whether by resale or lease, as a public trust the land itself being dedicated to the uses and purposes of the Act, among which purposes is the payment of all lawful obligations. The powers, rights and duties arising under this venerable State law (Stat. 1897, p. 254 as amended; now codified as Stat. 1943, Ch. 368, Div. 10 and 11) have been fully construed by this Honorable Court, by the Supreme Court of the United States, and the California Courts. This State law is not alone a statute authorizing the financing of wealth creating public works, but it is also a land reform law designed to curb the opportunity for land speculation, and to protect the common good.

Appellee issued and sold two bond issues dated January 1, 1922, and May 1, 1924, due serially 1934 to 1964 without option of prior payment, bearing interest at 5½% and 6% payable semi-annually which bonds it paid punctually until January 1, 1933. Since that date it has continuously violated the laws governing its trust obligation to appellant.

The first serious effort by appellee to repudiate its obligation to lay and collect the taxes required by law was disallowed by this Honorable Court, as re-

ported in 89 Fed. (2d) 1002. Certiorari was denied October 11, 1937, 58 S. Ct. 30.

The second action to bludgeon bondholders into accepting the compromise settlement it had failed to enforce the first time, was begun by the filing of a petition June 17, 1938 whereupon appellant filed his claim and set up his defenses. The final decree, dated July 15, 1941, on becoming final terminated the jurisdiction allowed by the provisions of 11 U.S.C.A. 401-403 the base of that proceeding. No jurisdiction over the debtor or the creditors or their bonds or other claims is authorized under 11 U.S.C.A. 401-403, unless they voluntarily have consented to jurisdiction. Appellant has at no time consented to bankruptcy jurisdiction over the bonds held by him, and does not now. Appellant's bonds, with certain others, were separately recognized and designated by the final decree of July 15, 1941 as "still outstanding obligations". (R. 27.) They are still legal for the investment of trust funds and savings banks under the laws of California, evidenced by the State Controller's certificate affixed to each bond. (R. 175.) The law authorizing this State certification is still in full force and effect. (Sec. 20000-83, Ch. 368, Stat. 1943.)

Appellee has shown no lawful right, title or interest in or to the $32,811.95 now in *custodia legis,* but given to it by the District Court on December 31, 1946, without warrant of law. The funds deposited in *custodia legis* created a trust fund subject to the final decree of July 15, 1941, and Title 28 of the Judicial Code, Secs. 851-852. Under no circumstances can they

be disbursed except as provided in the final decree, which became final November 9, 1942, unless and until the claims upon that fund have become disposed of, so that valid claims to the fund no longer exist.

Appellant owns 17 bonds of Merced Irrigation District of $1,000 denomination, bearing 5½% and 6% interest coupons which the District ever since 1933 has unlawfully failed, refused and neglected to pay in whole or in part. These bonds bear fixed maturity dates, and none are redeemable or callable prior to their due dates. 14 of the bonds are not lawfully due, their fixed maturity dates being 1952 to 1961.

It is stipulated (R. 101) that the transcript of record on appeal in case No. 9242 and case No. 9955 in this Court shall be a part of the record on appeal herein, but need not be reprinted. The form of the bonds owned by appellant is shown. (R. 13, case No. 9242.)

THE ISSUE OF THIS APPEAL.

From the foregoing statement it is apparent that the main issue presented in this appeal is a simple one.

It may be stated as follows:

Did the District Court err in ruling that the still outstanding obligations owned by appellant are outlawed by an applicable statute of limitations?

If so, is the order giving the $32,811.95 in *custodia legis* to the bankrupt after 45 days, unless sooner all claimed and withdrawn, an allowable modification of the final decree?

SPECIFICATION OF ERRORS AND POINTS ON APPEAL.

While this appeal presents but one main issue, the designation of points on appeal (R. 88) lists 12 points, the following will be relied on as constituting errors by the District Court in making the order from which this appeal is taken. These points are as follows:

1. The District Court erred in ruling that any of the bonds or coupons owned by J. R. Mason are outlawed, because some are not yet lawfully due or payable, and because those which are past due were all duly presented for payment, and are thus brought under the provisions of Sec. 52 of the Irrigation District Act, and are not subject to the statute of limitations otherwise applicable to past due claims.

2. The District Court, after the final decree had become final, is not authorized in proceedings under 11 U.S.C.A. 401-403 to make any additions to its substantive provisions, and was without jurisdiction as a court of bankruptcy to enter the order and decree of December 31, 1946 unless the statute of limitations applicable to the still outstanding bonds and coupons held by J. R. Mason had run, as a matter of law.

3. The doctrine of laches is inapplicable in the absence of any showing of injury. No such showing appears in the record.

4. The District Court erred in ordering the funds originally placed in the registry of the court to pay "the holders of such bonds in accordance with said Interlocutory Decree", given to the bankrupt unless withdrawn by the holders of still outstanding bonds within 45 days. No showing was made that the bankrupt has any

right, title or interest in or to any of this fund, the disbursement of which is governed by the provisions in Title 28 of the Judicial Code, Sections 851-852. No time limitation is provided in these sections of the Judicial Code within which lawful claims may be presented and paid.

5. The District Court erred in entering the order, because it has the force and effect of unlawfully giving abatement from mandatory taxation to private holders of land titles, and of allowing them to retain the land titles in violation of State law and decisions of the highest State Court, and of the Supreme Court of the United States. The effect of the decree is to enable tax evading and tax avoiding holders of land to unlawfully reap unearned increment, at the expense of the holders of "still outstanding" bonds, and with no benefit to the common good.

6. The District Court erred in failing to lift the restraints in the final decree, as requested, which restraint has the force and effect of permitting public tax officials of California to violate the Constitution and laws of California applicable under Deering's General Laws, Act 3854, p. 1792 (Stat. 1897, p. 254 as amended), in that it operates to release them from the performance of statutory taxing duties, as construed by the highest State Court, and also by the Supreme Court of the United States.

7. Appellant is a holder of valid, binding and unpaid original "still outstanding" bonds and coupons issued by Merced Irrigation District, whose vested rights as a bondholder are governed by State law and decisions, and are secured against impairment by Art. I, Sec. 10, cl. 1, and

the 5th and 14th Amendments to the United States Constitution; and also by Art. I, Sec. 16; Art. VI, Sec. 13; Art. IV, Sec. 25, sub. 16 of the California Constitution.

ARGUMENT.

1. THE DISTRICT COURT ERRED IN RULING THAT THE BONDS AND COUPONS OWNED BY APPELLANT ARE OUTLAWED.

There was no dispute between the parties in the District Court that State law and decisions control this case, there being no Federal statute of limitation "applicable to the still outstanding obligations".

In a letter addressed to the District Court November 12, 1946 (R. 55) appellee contended,

> "It is our position that the court is now without jurisdiction to allow Mr. Mason to take the money if he now desires to do so. If the statute of limitations has run as we contend, the court would seem to have no jurisdiction except to order the money returned to the Irrigation District. General equity authority would not seem sufficient to override a substantive rule of law. Once an appropriate statute of limitations has run the obligation to pay the money (if any exists) is extinguished.
>
> It is true that in the final decree the court said in effect that upon the expiration of the statute of limitation period the District might report back to the court for such action as the court deemed advisable. However, we do not make our case upon that order but upon statutory and sub-

> stantive rules of law by virtue of which we claim that the court can not exercise discretion in the premises but can only apply the law as it exists."

At no stage of the case did appellee show the statute of limitations which he relied on, or cite any Court decision construing such statute as being "applicable to the still outstanding obligations" such as are here involved.

Neither did he attempt to deny that the judgment of the Supreme Court of California in the case of *Moody v. Provident I. D.,* 12 Cal. (2d) 389, that the statute is inapplicable is decisive of the statutory and substantive rule of law governing this point. After considering the brief filed by appellant (R. 43) and exhaustive oral argument presented at the November 15 hearing (R. 105-157) the District Court thereupon ordered that the petition must be denied. (R. 57.) No law or decision was shown anywhere in the record (R. 157-199) supporting the reversal in the District Court order of December 31, 1946 which decrees:

> "That all outstanding bonds and coupons of the above named debtor effected by the plan of composition herein, and all claims of whatsoever nature based thereon, are now barred by the statute of limitations applicable thereto, and do not now constitute valid claims against said debtor * * *"

The 63 still outstanding bonds, of which appellant owns only 17 are fixed maturity bonds, 53 of which are not even lawfully due. The bonds are not redeem-

able or callable before their fixed due dates, and it is not disputed that the 3 past due bonds, and all past due coupons owned by appellant are valid and were duly presented according to the provisions of Sec. 52 of the Irrigation Act, which brings them under the substantive and statutory rule of law as construed and applied in the case of *Moody v. Provident I. D.* (supra), making the statute of limitations wholly inapplicable to any of the "still outstanding" bonds or coupons owned by appellant. In that case the Supreme Court of California settled that the presentation of bonds and coupons based on the same State laws as the bonds owned by appellant:

> "constituted a new agreement between the plaintiff and the district, under which the plaintiff's bonds and coupons would be exempt from the running of the statute of limitations until money sufficient to make payment thereof had come into the hands of the treasurer and notice given that money was available for the payment of the bonds. * * *
>
> It is settled law that an irrigation district is a governmental agency, and that it has such powers, and is subject to such liabilities as are expressly provided by statute. (Cases.) Likewise, it is also well settled that the law in force at the time the bonds and coupons are issued by a district become a part of the contract. (Cases.) * * *
>
> That the registering of the bonds and coupons, as provided by Sec. 52, supra, constituted a new agreement and tolled the statute of limitations until there was sufficient money in the hands of the treasury of the district with which to pay the

same, and notice given as provided by the California Irrigation District Act, is upheld by the United States Supreme Court in the case of *County of Lincoln v. Luning,* 130 U. S. 529, 33 L. ed. 766. The opinion in this case, after holding that a transaction similar to that which took place between the plaintiff and the district constituted the creation of a new agreement, used the following language: 'The cases of *Underhill v. Sonora,* 17 Cal. 172 and *Freeman v. Chamberlain,* 65 Cal. 603, are in point.' * * *

We also hold that the statute of limitations in this case is *tolled and can not be pleaded* by the district as a defense until the statutory period elapses after funds are in the hands of the treasurer *with which to make payment, and notice thereof given.*" (Emphasis supplied.)

Moody v. Provident I. D., 12 Cal. (2d) 389.

Instead of obeying the Constitution and laws of California, appellee has illegally since 1933 paid all except the holders of "still outstanding" bonds the full amount of money claimed and demanded, while the appellant's duly presented coupons lawfully payable in 1933 and semi-annually thereafter, and the principal due on bonds owned by appellant have been defaulted, and nothing at all has been paid to appellant during all these 14 years. This discriminatory misconduct by appellee is in violation of the law applicable, and governing its affairs as construed and applied also in the following cases:

Bates v. McHenry, 123 Cal. App. 81;

Shouse v. Quinley, 3 Cal. (2d) 357;

Provident v. Zumwalt, 12 Cal. (2d) 365;
El Camino v. El Camino, 12 Cal. (2d) 378.

In *Fontana Land Co. v. Laughlin,* 199 Cal. 625, 636, the Court said:

> "The power to nullify acts of the legislature prescribing a limitation upon the time within which actions may be commenced is not a judicial prerogative. Statutes of limitations become rules of property."

It is respectfully submitted that the power to prescribe a limitation upon the time within which actions may be commenced, where there is no statute of limitations "applicable to the still outstanding obligations", is equally not a judicial prerogative, and the Congress has not delegated any authority to its Courts to supply a statute of limitations under any statute or decision cited by appellee.

In *Moody v. Provident I. D.,* 12 Cal. (2d) 389, the Court further said:

> "It is further contended by the respondent that having the bonds and coupons registered and the district endorsement made by the treasurer as authorized by the provisions of section 52 of the California Irrigation District Act as amended in 1919, increasing the interest from 6% to 7% and specifying that the bonds and coupons should thereafter bear interest at the rate of 7 percent until funds were available for their payment, and the acceptance of the same by the plaintiff, *constituted a new agreement.* The consideration moving to the plaintiff would be the increased interest *and the waiving on the part of the dis-*

> *trict of the right to plead the statute of limitations,* thus, in any event rendering the entering of a money judgment against the district on the bonds and coupons an unnecessary and idle procedure. * * *"
>
> "The endorsement on the bonds and coupons by the treasurer of the district binds the district to pay that (7%) rate of interest *whenever* funds are available for such purpose. Thus, the financial interests of the plaintiff are rendered *exactly the same by the endorsement as it would be after obtaining a money judgment.*" (Emphasis ours.)

The Supreme Court of California has clearly and unequivocally decided that the applicable State law does not allow appellee to plead the statute of limitations as against the "still outstanding" past due bonds and coupons owned by appellant, all of which were duly presented for payment according to controlling State law.

The decree of the District Court, that the statute of limitations "applicable to the still outstanding" bonds and coupons has run, is an error of law, because it contravenes the decision of the Supreme Court of California, in the cases cited.

2. THE DISTRICT COURT, AFTER THE FINAL DECREE HAD BECOME FINAL, IS NOT AUTHORIZED TO MAKE ADDITIONS TO ITS SUBSTANTIVE PROVISIONS.

The final decree under 11 U.S.C.A. 401-403 was signed and filed July 15, 1941. It became final November 9, 1942. (R. 26.)

However much appellee may now wish that the claim of appellant had not been separately dealt with in that decree which expressly recognizes it as a "still outstanding obligation", until the statute of limitations "applicable", if any, has run, it is now too late to vary the force and effect of the final decree, which is final and conclusive of the proceeding under 11 U.S.C.A. 401-403. Appellee is not now in position to complain of the clear provisions in the final decree, at least not without a showing of injustice or hardship. There is no showing of injury to appellee or even the hint of it anywhere in the record.

The final decree, discharge and order settling report and account of disbursing agent (R. 26) does not cancel and annul the "still outstanding obligations", but expressly excepts them from the language embodied in paragraph 3 of the decree, while paragraph 2 provides as follows:

> "If any money shall remain in the hands of the Registrar *after* petitioner claims that *the statute of limitations applicable to its still outstanding obligations, if any, has run,* petitioner may so report to this Court for such further action respecting said money remaining in the hands of the Registrar as this Court may determine to be proper and for the final closing of the proceeding." (Emphasis ours.)

In this action, appellee has pointed to no case supporting his argument. (R. 129.) Neither has he suggested that the cases cited by appellant are not completely controlling of the disputed point, and the District Court sustained the objections filed, in its order of November 15, 1946, when the Court said: "it is ordered that the petition herein is denied;" (R. 57). Because of certain conditions included in that proposed order (R. 58), objected to by appellant (R. 59) that order was not signed.

In the minute order of December 28, 1946 (R. 74) the Court did not show any statute of limitations "applicable to the still outstanding obligations", that has run, but rules that it has run and also rests its decision on "laches", and "that there has also been sufficient time under any applicable statute of limitations for the determination of the amount remaining in this fund". (R. 196.)

Therefore, because it was shown that no statute of limitations is applicable to the obligations owned by appellant, the Court appears to rule that some unshown statute applicable to the funds in the Registry of the Court has run, which materially varies the final decree. (R. 26.)

The final decree which was signed July 15, 1941 (R. 26) contains provisions and conditions in paragraph 2, making it very different from the conditions in the final decree first proposed, but not signed. (R. 21.)

It is now too late for appellee to wish that the final decree first proposed had been the final decree signed and filed.

The final decree contained no condition about a statute applicable to the funds in the Registry of the Court, but only to the statute, if any, "applicable to still outstanding" bonds and coupons of Merced Irrigation District.

The Supreme Court of California has settled that no statute of limitations is applicable to any bonds or coupons such as are owned by appellant. *Moody v. Provident I. D.,* supra.

No statute of limitations applicable to the funds in the Registry of the District Court was shown. None appears in the record. (R. 128.)

The decree of December 31, 1946 (R. 95) holding that "all claims of whatsoever nature based thereon, are now barred by the statute of limitation applicable thereto and do not now constitute valid claims against said debtor nor against said fund deposited by debtor with this Court" is arbitrary, capricious and an error of law, and it is also objected to as a variation and revision of the final decree of November 15, 1941, which became final and conclusive, November 9, 1942.

> "Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case and must carry it into execution *according to the mandate.* They can not vary it or examine it for any other purpose than execution;

or give any other or further relief; nor review it upon the matter decided on appeal, for error apparent, nor intermeddle with it further than to settle so much as has been remanded." (Emphasis ours.)

Ex parte Sibbald v. United States, 12 Pet. 488, 492.

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3. THE DOCTRINE OF LACHES IS INAPPLICABLE IN THE ABSENCE OF ANY SHOWING OF INJURY.

The District Court erred in finding appellant guilty of laches, in its decree of December 31, 1946 (R. 95, 96), when it said:

"* * * that the owners and/or holders of said outstanding bonds and/or coupons are guilty of laches in the premises and are barred thereby and by applicable statutes of limitation from receiving any part of said fund on deposit herein and/or from asserting any claim whatsoever against said debtor based on said bonds and/or coupons."

No applicable statute, federal or state is shown to warrant this order.

Title 28 of the Judicial Code, Secs. 851, 852, appears to govern the disbursement of, and the rights of creditors to present claims to funds such as those in the Registry of the Court in this case. No time limit whatever is provided in the Code within which lawful claims to such a fund may be presented.

"Lapse of time alone does not constitute laches, and delay will not bar relief where it has not

worked injury, prejudice, or disadvantage to defendants or others adversely interested."

Shell v. Strong, 151 Fed. (2d) 909, C.C.A. 10.

"As we understand, the courts generally enforce the rule that a plaintiff does not lose his remedy by mere laches, unless by delay his legal rights are also lost and the defendant acquires by prescription a right to commit the nuisance."

Anderson v. Town of Waynesville, 203 N. C. 37.

"Rights of creditors in fund are tolled, not by lapse of time but by distribution in accordance with statute."

In re Van Schaick, 69 F. Supp. 764.

"A surplus of funds in custodia legis, arising after payment of principal claims in a bankruptcy, * * * may be devoted to payment of interest on such claims."

Kiyoichi Fujikawa v. Sunrise Soda Water, 158 F. (2d) 490, C.C.A. 9.

The law governing escheat of other funds in *custodia legis* is reviewed at length by the Fifth Circuit Court of Appeals in the case of *Louisville & R.R. Co. v. Robins,* 135 F. (2d) 704.

It is significant that the Congress inserted no such limitations in Chap. IX (11 U.S.C.A. 401-403) as are provided in other chapters of the Bankruptcy Act.

No showing or even claim of injury by appellee or anybody else appears in the record, and the judgment that appellant is guilty of laches, is an error of law.

4. THE DISTRICT COURT ERRED IN ORDERING THE FUNDS PLACED IN THE REGISTRY OF THE COURT TO PAY "THE HOLDERS OF SUCH BONDS IN ACCORDANCE WITH SAID INTERLOCUTORY DECREE", GIVEN TO THE BANKRUPT UNLESS WITHDRAWN WITHIN 45 DAYS.

The funds in the Registry of the Court do not, under any circumstances belong to Merced Irrigation District, which never had any pecuniary right to them.

The District is merely a statutory public trust, all funds, land and property under its control being dedicated a public trust owned by the State of California. This was settled in *El Camino v. El Camino,* 12 Cal. (2d) 378.

There is no proof, or even any showing in the record that appellee ever has had any lawful right, title or interest in or to this money.

In the case of *Compton-Delevan I. D. v. Bekins,* 150 F. (2d) 526, it was held by this Court, that funds similarly in *custodia legis* do not belong to a California Irrigation District even when unclaimed within the time allowed by a decree. Certiorari was denied by the United States Supreme Court in that case.

In the case of *United States v. Greer Dr. Dist.,* 121 Fed. (2d) 675, it was held that disputed funds are "not that of the District, but of the bondholders, the District being as to it (the fund) but a trustee for them."

There are reasons, believed by appellant to be good and sufficient to justify him in taking the loss of interest he has suffered by leaving this money in *custodia legis.* The final decree (R. 26) provided explicitly

that the funds would remain in *custodia legis* until the statute of limitations "applicable to the still outstanding obligations" had run.

The rights of bondholders construed in *Nevada Nat. Bank v. Sup.*, 5 Cal. App. 638, are not covered by the plan of composition filed by Merced Irrigation District, nor by the interlocutory or final decrees entered by the District Court. For this, and other good reasons, appellant has been unwilling to give up his bonds for the money in *custodia legis* which is only part of the money his bonds entitle him to, according to Stat. 1943, Ch. 368, Secs. 26500-26553.

The decree of December 31, 1946 giving these funds to appellee unless withdrawn without objection in 45 days, is a variation and modification of the final decree.

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5. THE DISTRICT COURT ERRED IN ENTERING THE ORDER, BECAUSE IT HAS THE EFFECT OF UNLAWFULLY GIVING ABATEMENT FROM MANDATORY TAXATION TO PRIVATE HOLDERS OF TAXABLE LAND TITLES, AND OF ALLOWING THEM TO RETAIN THE LAND TITLES IN VIOLATION OF LAW AND DECISIONS OF THE HIGHEST STATE COURT, AND THE SUPREME COURT OF THE U. S.

The decree of December 31, 1946 (R. 96) which says that the holders of "all outstanding bonds and coupons" are "barred * * * from asserting any claim whatsoever against said debtor based on said bonds and/or coupons", if allowed by this Court, would have the force and effect of "interfering" with obligations not created by private contract or stipulation,

but which are incidents by law, established by the legislature and by the highest Court of the State. The encumbrance should be accorded at least as much dignity and importance as a like burden imposed on the land by the parties by covenant. *U. S. v. Aho,* 68 F. Supp. 358.

The statutes of California expressly provide that all lands in the district are dedicated a public trust for the "uses and purposes" of the Act, and that all land shall be and remain liable to be assessed, among other things, to pay principal and interest on all bonds.

Provident v. Zumwalt, 12 Cal. (2d) 365.

It was intended that this would create an irrevocable and paramount obligation upon all land in the district, and its "rent, issues and profits", in order to insure repayment of lawfully issued bonds. There is no provision for the release of any land from the encumbrances so created by law. Only after all outstanding bonds and costs have been paid, or provision is made for their payment in full, can a District be dissolved. *Happy Valley Water Co. v. Thornton,* 1 Cal. (2d) 325, Stat. 1903, p. 3; Stat. 1915, p. 859; Stat. 1919, p. 751, amended, Stat. 1925, p. 220.

The law of California, by statute and decision, has created an encumbrance on all land in Merced Irrigation District which holds the land itself for future assessments, and which specifically places the land under the charge to be made from year to year, as required by law. *Provident v. Zumwalt,* supra.

Nothing in Chapter IX authorizes the District Court to make orders which contravene the limitations in Sec.

64a of the Bankruptcy Act, or in 28 U.S.C.A. § 41(1), sub. (3)(4); 28 U.S.C.A. § 379; 11 *Am. Jur.* Conflict of Laws § 30.

This restraint on appellant violates his vested property rights, as a holder of "still outstanding obligations", and is an error of law.

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6. **THE DISTRICT COURT ERRED IN FAILING TO LIFT THE RESTRAINT IN THE FINAL DECREE, WHICH RESTRAINT HAS THE FORCE AND EFFECT OF PERMITTING PUBLIC TAX OFFICIALS OF CALIFORNIA TO VIOLATE THE CONSTITUTION AND LAWS OF CALIFORNIA APPLICABLE, IN THAT IT SERVES TO RELEASE THEM FROM THE PERFORMANCE OF STATUTORY TAXING DUTIES, AS CONSTRUED BY THE HIGHEST COURTS.**

The original Chapter IX (11 U.S.C.A. 301-304) held unconstitutional in *Ashton v. Cameron County,* 298 U. S. 513, provided that, even in the interlocutory decree, the Court could make the plan of composition binding on the debtor, but the amended Chapter IX has no such provision.

No restraint is authorized except upon the filing of the interlocutory decree under 11 U.S.C.A. 401-403.

The point which distinguishes this case from all others, is the provision in this final decree which segregates the bonds owned by appellant, and certain others, and which designates them as constituting "still outstanding obligations". Manifestly a decree can not both cancel an obligation, and also recognize it as a "still outstanding obligation" at the same time. Either the bonds owned by appellant are "still out-

standing obligations", as designated in paragraph 2 of the final decree (R. 27), or else they are among those bonds "cancelled and annulled" in paragraph 3 of that final decree. If appellant's bonds now belong in the latter category, no restraint was needed in the final decree, while if "the statute of limitations applicable to the still outstanding obligations" has not run, the restraint violates 11 U.S.C.A. 403(c), sub. (a); 403 (e) sub. (6); 403 (i) because it has the force and effect of "interfering" with the execution of mandatory State land tenure and tax laws, as construed and applied repeatedly by the Courts in the following cases:

Fallbrook I. D. v. Bradley, 164 U.S. 112;
Herring v. Modesto I. D., 95 F. 705;
Shouse v. Quinley, 3 Cal. (2d) 357;
Selby v. Oakdale I. D., 140 C. A. 171;
Provident v. Zumwalt, 12 Cal. (2d) 365;
Moody v. Provident, 12 Cal. (2d) 389.

The Supreme Judicial Council of Massachusets, in the recent case of *Commissioner of Corporations and Taxation,* 54 N.E. (2d) 43 said:

> "Decision of the U. S. Supreme Court, in construing a federal statute was entitled to due deference and respect but was not binding on Supreme Judicial Court in construing Massachusetts Taxing Statutes."

See also:

Comm. v. Skaggs, 122 Fed. (2d) 721, C.C.A. 5.

In *Gardner v. State of N. J.,* decided January 20, 1947 (15 L. W. 4171) by the United States Supreme

Court, that Court again reaffirmed that obligations supported by the sovereign taxing power of a State, are still beyond the power of the bankruptcy clause to disallow. The Court said:

> "Nor do we intimate any view on the amount of the tax claim which should be allowed, or on the validity, character, priority or extent of the lien asserted by New Jersey, or on the manner in which it should be satisfied in a plan of reorganization. We only hold that the reorganization court could properly entertain all objections to the claim, except those involving the valuations underlying the assessments and the validity of those assessments. * * * Res judicata may have made binding on the Reorganization Court various questions of local law, including the amount and validity of taxes under New Jersey law and the character and extent of the lien that law affords them."

At no stage of the proceedings under Chapter IX, or here, has there been any objection "involving the valuations underlying the assessments or the validity of those assessments", against which assessments appellant's bonds are a fixed claim, ranking ahead of other real property liens public or private according to law. The priority of this lien was recently construed by this Honorable Court in *Fallbrook v. Cowan,* 131 F. (2d) 513, C.C.A. 9 (certiorari denied).

No objection to the claim of appellant upon the assessments appears anywhere in the record of this case, or in any stage of the Chapter IX proceeding.

Squarely in point appears to be the case of *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 436, where the Court said:

> "a restraining order issued by a court having no jurisdiction under the applicable statute or the Constitution is void ab initio and, therefore no contempt proceeding can be maintained for any disobedience of its provisions."

> "Courts can not usurp the functions of the legislature, nor read into a statute something which they may conceive to have been unintentionally left out by the legislative body."
>
> *State v. Reeves,* 129 Pac. (2d) 805.

> "No mere omission nor mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to language of the statute."
>
> *Porter v. Novak,* 157 F. (2d) 824. C.C.A. Mass.

> "Generally, effect of bankrupt's discharge on particular debt is determined in plenary action brought in court other than bankruptcy court by creditor to enforce debt against discharged bankrupt, and an essential part of trial of such action is a determination of effect of discharge when pleaded by bankrupt as an affirmative defense. Federal Rules of Procedure, rule 8(c), 28 USCA following sec. 723 c; Bktcy Act, §§ 14, 17, 11 USCA §§ 32, 35."
>
> *In re Anthony,* 42 F. Supp. 312.

> "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure

full federal authority, completely displacing the States."

Hill v. Florida, 325 U.S. 538.

"It is submitted * * * that the right of the holders of municipal and quasi-municipal bonds to compel the exercise of the taxing power for the satisfaction of their claim is at least as definitely a property right as are the rights of mortgagees."

1 Jones, Bonds and Bond Securities, (4 Ed.) Sec. 480.

Louisiana v. New Orleans, 215 U.S. 170;
Ex parte Ayers, 123 U.S. 443;
Cargile v. N.Y. Tr. Co., 67 F. (2d) 585;
Huddleson v. Dwyer, 322 U.S. 232;
Fallbrook I. D. v. Bradley, 164 U.S. 112;
Snowden v. Hughes, 321 U.S. 1.

The restraint in the decree as applied, is inconsistent with the inhibition in 11 U.S.C.A. 403(c), sub. (a); 403(e) sub. (6); 403(i). Nothing contained in Chapter IX or any chapter of the Bankruptcy Act authorizes a federal Court to shield State tax officials who have violated the Constitution and mandatory provisions of the land tax laws of their sovereign State, as construed by the State Court. The restraint here complained of will, if not stricken as prayed herein, allow both tax collectors and tax evading landholders to violate the law, and escape the penalties required by governing law.

7. APPELLANT IS A HOLDER OF VALID, BINDING AND UNPAID ORIGINAL "STILL OUTSTANDING" BONDS AND COUPONS WHOSE VESTED RIGHTS ARE GOVERNED BY STATE LAW, AND ARE SECURED AGAINST IMPAIRMENT BY ART. I, SEC. 10, CL. I AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION.

"Denial of certiorari by U. S. Supreme Court has no precedential significance."

In re Luma Camera Service, 157 F. (2d) 951, C.C.A. 2.

Since the *U. S. v. Bekins,* 304 U. S. 27, case, the Supreme Court of the United States has re-affirmed in numerous cases, the latest being *U. S. v. Carmack,* 67 S. Ct. 252 at page 255, that neither State consent nor submission can enlarge the powers of Congress. This basic question was not before the Court in the *Bekins* case, supra, as an actual controversy, and the Court did not, therefore, rule upon it, saying merely:

> "It is unnecessary to consider the question whether Chapter X (now IX, Act of Aug. 16, 1937, as amended), would be valid as applied to the irrigation district in the absence of the consent of the State which created it * * *".

U. S. v. Bekins, 304 U. S. 27.

In *Kohl v. U. S.,* 91 U. S. 371, cited with approval in the *Carmack* case, supra, the Court said:

> "If the U. S. have the power it must be complete in itself. It can neither be enlarged or diminished by a State * * * The consent of a State can never be a condition precedent to its enjoyment."

Nothing in the California laws upon which the bonds at bar are based authorizes any federal interference whatever with the orderly execution of the law governing appellee, by an Act of the Congress.

The Supreme Court has never reversed the following principle of law, as affirmed in *Louisiana v. New Orleans,* 215 U. S. 170:

> "The legislature of a State can not take away rights created by former legislation for the security of debts owing by a municipality of the State or postpone indefinitely the payment of lawful claims until such time as the municipality is ready to pay them."

The State, when it has exercised its sovereign power to tax the value of privately held land, is constitutionally immune from federal intervention.

Cargile v. N. Y. Trust Co., 67 F. (2d) 585,

and

Ex parte Ayers, 123 U. S. 443.

Stat. 1939, Ch. 72, being the supposed "consent" by California to the federal bankruptcy statute (Ch. IX) retrospectively takes away vested rights of appellant created by former legislation. The bonds at bar have been issued under laws existing since long before 1939. Such State laws cannot be applied retrospectively.

Shouse v. Quinley, 3 Cal. (2d) 357.

The bonds at bar are statutory claims against land rent assessments, to be levied and collected as required by law, and their inviolability has been construed over and over by the highest Courts, both federal and state.

The taxes, based on the assessments to pay bonds and coupons can not be levied until the year before the bonds and coupons fall due. Nothing in Ch. IX makes an exception to the rule declared in *Ex parte Williams,* 227 U. S. 267, as follows:

> "Assessments become reviewable judicially only when they are translated into action, as by a levy of a tax based on the assessment."

This principle of immunity was again re-affirmed in *Gardner v. State of N. J.,* decided January 20, 1947, by the United States Supreme Court (15 U. S. L. W. 4171), in a composition case, arising under the Bankruptcy Act.

In the *U. S. v. Bekins* case, supra, the Court further said: ,

> "It should be observed that Sec. 83 e (403-e) provides as a condition of confirmation of a plan of composition that it must appear that the petitioner 'is authorized by law to take all action necessary to be taken by it to carry out the plan' * * *
>
> The phrase 'authorized by law' manifestly refers to the law of the State."

There is nothing in the State law which allows appellee to fail, refuse or neglect to levy and collect the assessments as required by applicable State law, or which authorizes any Court directly or indirectly to temper the mandatory provisions in respect of levying and collecting the land taxes, in the manner and at the times required by the applicable State laws, as construed in *Provident v. Zumwalt,* 12 Cal. (2d) 365,

which decision is still controlling over the duties of appellee. It is significant that this sweeping decision came down 6 months after the *Bekins* case was announced, and it should be read with that fact kept in mind.

Any attempt to enter judicial orders adverse to taxpayers, is quickly disapproved, as in *Keane v. Strodtman,* 18 S. W. (2d) 898 (Mo.).

Can the vested rights of investors in lawful State and local tax secured bonds now be made inferior to those of tax evading private land holders by judicial decree?

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and can not be enforced."
>
> *Linder v. United States,* 268 U. S. 5, 17.

> "The Supreme Court has warned many times, that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though full compensation be paid."
>
> *Rindge Co. v. Los Angeles County,* 262 U. S. 700, 705.

If it appears not too late to modify the final decree of 1941, it is submitted that it should be reversed and the restraint lifted, in order that appellant may again have recourse to the California Court to seek an order to compel the responsible officials to cease and desist their long and flagrant violation of the applicable land tax laws of the Sovereign State of California, as construed by the highest State Courts.

Honorable Robert H. Jackson, as Solicitor General of the United States filed a brief in the *Bekins* case, supra, in which he stated to the Court:

> "The taxing agency, of course, is subject to the full control of the State, and its powers are only those granted by the State. Unless those powers, expressly or by implication, include authority to compose its debts and to invoke the jurisdiction of the bankruptcy court, the taxing agency can not seek the benefit of the Act of August 16, 1937. Not only, therefore, is the choice of the taxing agency wholly voluntary, but * * * it must necessarily be made subject to the provisions of the State law. Even after the taxing agency has itself invoked the bankruptcy jurisdiction, the court is without any control over its fiscal affairs or governmental activities."

In *El Camino v. El Camino,* 12 Cal. (2d) 378, the Court held squarely that all the fiscal and other affairs of a California Irrigation District are "governmental functions exclusively".

In *Providence Bank v. Billings,* 4 Pet. 514 at p. 560, it was said:

> "There are certain powers which are inherent in the people and can not be alienated, even by the people themselves, much less by their representatives to whom the powers are entrusted for a time; not to be subjected to interference by any other Sovereignty * * *"

The sovereign power of a State to borrow money upon the rent of land within its dominion free from federal intervention was debated at length in *The Federalist,* Essays Nos. XII, XXX to XXXVI. In Essay XXXII, Hamilton said:

> "* * * I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties or imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution."

There is no proof anywhere in the record that appellee is entitled to violate the law, or that the vested property rights of appellant, secured by Art. I, Sec. 10, Cl. I and the 5th and 14th Amendments to the United States Constitution are not violated by the District Court decree. The cases cited by appellant completely support his objections and claim, and no question of its validity appears.

CONCLUSION.

The "still outstanding obligations" of Merced Irrigation District owned by appellant are obligations of "a State or any political subdivision thereof" within the meaning of the statutory exemption in the successive Revenue and Bankruptcy Acts, including 11 U.S.C.A. 401-403. (72 Op. Att. Gen. 38, Feb. 4, 1937.)

The Constitutional immunity from federal intervention of such fiscal affairs of a sovereign State is long and thoroughly settled, and the importance of its original formulation is more visible at home and abroad than ever before.

We have shown that the restraint in the final decree, and in the decree of December 31, 1946, if it stand, would have the force and effect of allowing tax evading and tax avoiding private holders of land to escape payment of the land debt as fixed and required by the governing law, and to retain privately held titles to land within the dominion of the State, in absolute violation of controlling State law and decisions. Also, that such restraint deprives appellant of vested property rights fixed by State law and secured by the Constitution of the United States.

No Act of Congress or of California has repealed or amended the statute which imposes upon appellee the continuing duty to levy and collect the unlimited ad-valorem land assessments, and ground rent as long as is necessary to fully pay the bonds and interest claim owned by appellant. There is no suggestion that any competing claim to the rent of the land in Merced Ir-

rigation District is paramount to the claim of appellant, or that any competing claim exists at all.

No statute of limitations applicable to the "still outstanding obligations" is shown, and appellee claims no injury or hardship by reason of the fact that the $32,811.95 is still in *custodia legis,* and has shown no right, title or interest in or to that fund.

Wherefore, appellant respectfully submits that the decree of the District Court be set aside as without warrant of law, and that this Honorable Court reaffirm the Constitutional immunity from Federal intervention of the still outstanding obligations owned by appellant under the successive Revenue and Bankruptcy Acts, including 11 U.S.C.A. 401-403.

Dated, San Francisco,
July 25, 1947.

J. R. Mason,
Appellant Pro Se.

No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. Mason, *Appellant,*	
vs.	
Merced Irrigation District, *Appellee.*	

BRIEF FOR APPELLEE.

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No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. Mason,

Appellant,

vs.

Merced Irrigation District,

Appellee.

BRIEF FOR APPELLEE.

QUESTION PRESENTED.

This appeal is from a supplemental order entered in a composition proceeding commenced in 1938 under the provisions of Chapter IX of the Bankruptcy Act (11 USCA Sec. 401 to 404). Merced Irrigation District, hereafter referred to as the District, is the debtor in the proceeding and is the present appellee. Mr. Mason, one of the bondholders of the District, is the appellant. The main proceedings, including approval of the plan of composition and entry of the interlocutory and final decrees, were concluded many years ago as will appear hereafter in detail. After the interlocutory decree approving the plan of composition became final, the vast majority of the bondholders surrendered their bonds and were paid off at the com-

position rate. Subsequently the District deposited money in Court sufficient to retire all remaining bonds on the same basis and, except for Mr. Mason's bonds, all of these too have been so retired with certain negligible exceptions we will mention later.

Mr. Mason is the owner of District bonds in the face amount of $18,000.00. (R(9242) 118.) At the composition rate this would entitle him to $9,270.18. (R. 110.) But Mr. Mason has consistently and repeatedly refused to take this money and surrender his bonds. The lower Court after giving him every opportunity to participate as the other bondholders had done finally held that he was no longer entitled to the money for detailed reasons hereafter appearing, and ordered the money remaining on deposit returned to the District and the proceedings finally terminated. Mr. Mason on this appeal questions the propriety and validity of this order.

The case has twice before been before this Court on Appeal. The interlocutory decree was approved here[1] and the final decree was likewise.[2] Certiorari and rehearing were denied by the United States Supreme Court in each instance.[3] The present parties have

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[1] *West Coast Life Insurance Company v. Merced Irrigation District*, Case No. 9242, 114 Fed. (2d) 654; Certiorari denied by the United States Supreme Court in *Pacific National Bank of San Francisco v. Merced Irrigation District*, 61 S. Ct. 441, 311 U.S. 718, 85 L. Ed. 467; Rehearing denied, 61 S. Ct. 620, 312 U.S. 714, 85 L. Ed. 1144.

[2] *Mason v. Merced Irrigation District*, Case No. 9955, 126 Fed. (2d) 920; Certiorari denied, 63 S. Ct. 38, 317 U.S. 645, 87 L. Ed. 520; Rehearing denied, 63 S. Ct. 153, 317 U.S. 707, 87 L. Ed. 564.

[3] See footnotes 1 and 2, supra.

stipulated that the records on these two preceding appeals (cases Nos. 9242 and 9955) may be referred to in the present briefs. We will cite the transcript of record in this case as R ...... and the records in cases No. 9242 and No. 9955 as R(9242) ...... and R(9955) ...... respectively.

STATEMENT OF THE CASE.

A clear understanding of exactly what has occurred in this case is absolutely essential for a just consideration of the rights of the respective parties. While in most instances an injustice might appear to be done by returning to a debtor money deposited by it to pay off its obligations at a composition rate, in this instance there is no such injustice, and on the contrary such action was sound in principle and just at law. The Court below exercised great care and extreme caution in protecting every possible right of appellant. In fact we feel its indulgence of appellant went far beyond any necessary bounds. In short, it is our position that appellant has no legitimate complaint whatsoever as to his treatment in the lower Court. To show vividly the truth of this contention we would like to point out, somewhat in detail, exactly what did happen in this case up to the time of the entry of the order appealed from. These facts, more strongly than all the argument we could present, establish without question the thorough correctness of the District Court's order and the extent to which a legitimate right to hearing in Court has been exceeded and transgressed by appellant.

On June 17, 1938, the District filed its petition for composition of its bonded indebtedness (R(9242) 8). After extensive hearing, the Court approved the plan presented and on February 21, 1939, entered its interlocutory decree which provided that the bonds were to be discharged at the rate of 51.501¢ per dollar (R 2). The decree provided further for the mechanics of disbursing the sums to the bondholders, and for the eventual deposit of money with the Court to discharge at the composition rate all outstanding bonds not retired by the disbursing agent. This interlocutory decree was appealed from by Mr. Mason and others and was approved in this Court, certiorari and rehearing being then denied by the Supreme Court.[4] On April 1, 1941 the money was made available to the bondholders through a disbursing agent, as provided in the interlocutory decree, and the great majority of it was so disbursed. On June 2, 1941, in further accordance with the decree, the remaining sum was deposited with the Court as Registrar for payment to bondholders who had failed to redeem their bonds through the disbursing agent but who might thereafter desire to do so. Thereafter, on July 15, 1941, a final decree was entered (R 26). It ratified the disbursements which had been made, and approved the deposit with the Court of all necessary additional sums to redeem bonds still outstanding. It then discharged the District of all obligations included in the composition proceedings.

---

[4]See footnote 1, supra.

As originally presented to the Court for signature, this final decree provided that in the event the holders of still outstanding bonds failed to surrender their bonds and accept payment at the composition rate within twelve (12) months, the money deposited would revert to the District and those outstanding bondholders would be forever barred (R 23). Since the time that the final decree was entered similar provisions have frequently been upheld.[5] However, at that time, the present appellant, Mr. Mason, objected to this time limitation and, therefore, the District Court revised the provision, and the decree as actually signed provided:

> "If any money shall remain in the hands of the Registrar after petitioner claims that the Statute of Limitations applicable to its still outstanding obligations, if any, has run, petitioner may so report to this Court for such further action respecting said money remaining in the hands of the Registrar as this Court may determine to be proper and for the final closing of this proceeding." (R 27).

The final decree, containing this language, was also appealed from by the present appellant, Mr. Mason, and it too was approved on appeal, certiorari and re-

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[5] *Mason v. Palo Verde Irrigation District*, 132 F(2d) 714, certiorari denied, 63 S. Ct. 982, 318 U.S. 785, 87 L. Ed. 1152, rehearing denied, 63 S. Ct. 1027, 319 U.S. 780, 87 L. Ed. 1725; *Mason v. El Dorado Irrigation District*, 144 F(2d) 189, certiorari denied, 65 S. Ct. 91, 323 U.S. 758, 89 L. Ed. 607, rehearing denied, 65 S. Ct. 187, 323 U.S. 816, 89 L. Ed. 649; *Mason v. Banta-Carbona Irrigation District*, 149 F(2d) 49, certiorari denied, 66 S. Ct. 98, 326 U.S. 757, 90 L. Ed. 455, rehearing denied 66 S. Ct. 166, 326 U.S. 808, 90 L. Ed. 493.

hearing again being denied by the United States Supreme Court.[6]

Nothing further of note then occurred in the case until July 20, 1946. By then more than five (5) years had elapsed since the money had been deposited in Court and the final decree entered. The District concluded that any possible applicable statute of limitations had therefore run, and, pursuant to the language of the final decree filed a petition praying that the money then remaining on deposit with the Court be returned to it and that the proceeding be finally terminated (R 30).

The initial hearing on this petition was had after due notice thereof on October 29, 1946, the District appearing by counsel and appellant appearing in his own behalf. After the presentation of some testimony and considerable argument, the Court propounded a question to the appellant as follows:

> "The Court. Are you willing to accept the amount which the other bondholders have accepted for their obligations?" (R 119).

Appellant gave no direct answer to this question. Instead considerable discussion ensued between him and the Court (R 119 to 126). The Court expressed a desire to allow appellant still to receive payment at the composition rate, provided he surrendered his bonds (R 123). However, appellant refused to give the Court a satisfactory answer to its question and eventually asked for an extension of time in which to

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[6]See footnote 2, supra.

consider it and in which to seek the advise of counsel (R 125). This the Court granted.

The Court convened again for further consideration of the matter on November 15. There was further argument, and remarks by the Court. The Court, in its remarks, took the position that it still had equitable authority in this matter and that if appellant were not barred by laches, which the Court at that time felt he was not, the Court would still be willing to grant him the money upon the surrender of his bonds (R 133). Further discussion was had between the Court and appellant from which the Court apparently concluded that appellant was willing to accept the money at the composition rate and surrender his bonds (R 155). So concluding, the Court directed that an order so providing be prepared by counsel for the District (R 155). An order, in accordance with the direction of the Court, was so prepared (R 58). Upon receiving a copy of this proposed order, and before it was signed, appellant filed objections to it (R 59). His objections concluded with the following prayer:

> "Wherefore, respondent prays that all the language following 'It is ordered that said petition be denied' in the proposed order be stricken, that the restraints in the final decree be lifted, on the ground that they are without warrant of law, and that the proceeding be dismissed. Should this prayer be denied, respondent requests the opportunity to present further argument, orally, before the proposed order is signed." (R 71).

The Court upon receiving appellant's objections ordered another and further hearing because it was

again in doubt as to appellant's position and as to whether he was willing to accept payment at the composition rate (R 72).

This hearing was had December 28, 1946. Appellant presented at length his reasons and views for objecting to the proposed order (R 157 to 186). The Court then made a complete statement and a careful analysis of the case (R 186 to 195) and concluded as follows:

> "It now appears that the court misapprehended Mr. Mason's attitude in the premises, and it now appears, and the court finds, that respondent Mason is not willing to comply with the suggested direction of the Court, as indicated by the record.
>
> "The court further concludes that laches have occurred and that there has also been sufficient time under any applicable statute of limitations for the determination of the money remaining in the fund.
>
> "The court concluding that it had jurisdiction over its fund, and it is the fund that is in question in this proceeding at this time, I would not be inclined to accept the suggestion of counsel for the District because of a desire to afford to those bondholders, including Mr. Mason, the opportunity to share in this money in preference to the Merced Irrigation District. But it must be done on the basis of the court's direction and not upon any other theory. Apparently, that is not satisfactory to Mr. Mason, so that counsel for the District will prepare an order along the lines suggested in his argument, and present that for signature, and it will be signed." (R 195).

The order was therefore prepared, and was signed by the Court December 31, 1946 (R 76). That order is the order appealed from. It will be noted, however, that even this order did not summarily prohibit appellant from participation in the fund. Even though it was held that appellant was then barred by applicable statutes of limitation and laches from participating in the fund, the District consented to, and the order allowed, a grace period of forty-five (45) days, during which time appellant was still allowed to claim the money (R 78). Appellant, however, continued to refuse to do so. Instead he has appealed here.

Before passing from this statement of the facts, we wish to point out an incorrect statement in appellant's brief. It was, of course, an unintentional misstatement, but we feel it should be corrected. He stated that bondholders other than himself had failed to surrender their bonds and indicated that the money deposited to discharge their bonds would revert to the District if this order were affirmed. This is not in fact correct since these other bondholders did surrender their bonds and accept payment at the composition rate during that final forty-five (45) day grace period. Appellant apparently did not receive word of this. In any event, outstanding now are only appellant's bonds, one bond the ownership of which is entirely unknown, and a few miscellaneous coupons. The amount in *custodia legis* is no longer \$32,811.95 as appellant frequently states, but only \$10,151.15.

REPLY TO APPELLANT'S SPECIFICATION OF ERRORS, AND ARGUMENT.

Legal basis for the order.

Before considering individually the errors claimed by appellant, we would like to point out generally the legal grounds warranting the order appealed from here. That order provided: (1) That every applicable statute of limitation had run on the district's obligation to appellant, and that therefore appellant was barred from claiming any of the money deposited with the Court. (2) That appellant was barred by laches from asserting any claim to such money. (3) That even though appellant was thus barred and his claim outlawed, the Court allowed him, with the District's consent, forty-five (45) days more in which to participate on the same basis as the other bondholders (R. 76). We strongly contend that each of these three provisions is legally sound and proper. However, we believe it is self evident that even if only one of them be legally correct, that provision alone, whichever one it may be, is fully sufficient in and of itself to justify the order. For whether appellant has become barred by a statute of limitations, or by laches, or because he failed to claim the money during the forty-five (45) days allowed, he has now certainly lost any and all rights he may have had. Of course, as originally stated, we are fully satisfied that all three provisions are completely proper and that each has full legal justification, but, in any event, to reverse the order below this Court must necessarily hold that all three provisions are improper.

Statute of limitations.

Appellant contends that he is not barred by any statute of limitations. The final decree provided that if any money remained in the fund deposited with the Court when it was claimed that the statute of limitations applicable to still outstanding obligations had run, the District could so report to the Court for further action and for final closing of the proceeding. The District filed its petition pursuant to this provision. The petition was filed more than five (5) years after the money was deposited with the Court and the final decree entered.

We do not take any dogmatic position as to what specific statute of limitations applies to such obligations. The District Court was of the opinion it had equitable jurisdiction of the disposition of the fund entirely independent of statutes of limitations and whether or not any had run. We will discuss these equitable considerations later. But in any event the applicable statute of limitations here could only be five (5) years or less. The obligation to deposit money against the bonds was created by the interlocutory decree in accordance with the Bankruptcy Act. This Act provides no statute of limitations for such an obligation. We must, therefore, turn to the State law to find the appropriate statute (28 USCA Sec. 725). On examining State law we find that the applicable statute must necessarily be one of the following:

> *Code of Civil Procedure 338:* "Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

Code of Civil Procedure 337(1): "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing. * * *"

Code of Civil Procedure 336: "Within five years: 1. An action upon a judgment or decree of any court of the United States or of any state within the United States."

Code of Civil Procedure 343: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

There is certainly no statute in excess of five (5) years which could possibly apply. We believe that this is either an obligation created by statute (i. e. the Bankruptcy Act), thus falling under Code of Civil Procedure Section 338, or is a claim based on a decree of a United States Court as specified in Code of Civil Procedure Section 336. The Court may prefer to fit it into one of the other categories. It makes no difference. For even if it be an obligation not covered specifically by one of the statutes, then by virtue of that very fact it falls under the four (4) year statute quoted above. The obligation is certainly barred by a lapse of time of more than five (5) years.

Appellant puts much stress on the case of *Moody v. Provident Irr. Dist.,* 12 Cal. (2d) 389. In that case matured bonds were presented for payment but could not be paid because of lack of funds. The treasurer of the District therefore endorsed on them that they

would bear interest at seven per cent (7%) from the time of presentation until notice that funds were available. The Court properly held that the statute of limitations was tolled by the new agreement, and that it would not again commence to run until funds were available and notice was given. No composition proceedings were involved in that case.

Here the situation is entirely different. There are at least three distinct differences. Firstly, the obligation created by the composition proceedings was a substantially new obligation. It was in the nature of a judgment. The obligation on the bonds was merged in it and the bonds thus lost their former significance and effect. It is this obligation created by the interlocutory decree that was the "still outstanding obligation" to which appellant refers so frequently. The law in the *Moody* case applicable to the bonds can have no application to such an obligation. Secondly, even if the doctrine of the *Moody* case were accepted, the statute would start to run when the money was available and appellant received notice thereof. The money was available to pay the obligation, when it was deposited in Court, and, of course, appellant had notice of this. So the requirements of the *Moody* case to start the running of the statute are specifically met. Thirdly, even though appellant contends he presented the bonds for payment as was done in the *Moody* case, and though we have no reason to doubt this fact, there is nevertheless no evidence in the record that this did in fact occur. For these several reasons then the *Moody* case can have no bearing here.

Before passing from the subject of the statute of limitations we wish to point out that such statutes are now definitely treated as meritorious legal defenses. They are no longer considered technical or inequitable. On the contrary they are now held to establish vested property rights and are looked upon with favor rather than skepticism.[7] Such a defense therefore is not one that a Court should attempt to avoid, and we fully believe that it is not a defense that the Court can avoid here. Although the District Court originally took the position that equitable power was involved and that the situation should be governed by laches rather than legal limitations, in its final order it declared that appellant was barred by both. It concluded that appellant had no standing in either equity or law and so applied both legal limitations and laches to bar his rights.

We believe that this obligation, created by the interlocutory decree, to pay approximately 51¢ on the dollar to outstanding bondholders created a legal obligation, and one subject to whatever statute of limitations would be applicable. We see no reason why it should be considered exempt therefrom. Even if it be a case for the application of equitable principles, a Court of Equity, though not bound by legal limitations, may give effect thereto in appropriate cases (19 Am. Jur. 342). This would certainly appear to be such a case. There is therefore a thor-

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[7]29 Cal. Law Rev. 210; *Fontana Land Co. v. Laughlin*, 199 Cal. 625, 250 Pac. 669, 48 A.L.R. 1308; *Loughman v. Town of Pelham*, 126 F(2d) 714.

oughly sound basis for the District Court's holding that this obligation is so barred.

Laches.

Appellant has persistently and continuously for many years refused to accept the deposited money and surrender his bonds. Though perhaps ill advised his actions have not been unadvised or casual. He has been granted stays by the Court for the specific purpose of getting legal advice on this very question. The Court has even expressed its own views and then given him a chance to decide. He has had opportunity after opportunity to share on this same basis as other bondholders, even after the District claimed that the Court had no power to give such opportunity, and even later yet when the Court actually made its ruling. Nevertheless he refused and apparently still refuses to participate on the basis judicially determined. He is certainly in a very poor position to ask for the protection of a Court of Equity. "The doctrine of laches being equitable in character, all facts and surrounding circumstances are to be considered in determining its applicability." (19 Am. Jur. cum sup. 22.) Therefore, even if the Court feels that the doctrine of laches, rather than legal limitations, should be applied in this case appellant is certainly no better off and must still be held to be barred.

In determining how long a period must pass before a person is guilty of laches, comparison is frequently made to legal statutes of limitation. (19 Am. Jur.

345.) The period of laches may be less or it may be more but the legal limitation is rightly used as a yardstick. As we have already shown, the legal limitation in this instance had necessarily passed when the District filed its petition. We believe that laches had also occurred at that time. But if for some reason appellant was entitled to more time the Court generously gave it to him, not just once but on several occasions. When the Court finally made the order appealed from there was no ruling it could logically make other than that laches had occurred.

Appellant contends that the doctrine of laches is inapplicable in this instance because there is no showing of injury to the District. Appellant's actions in no way entitle him to equity and under such circumstances his refusal to participate on the legally prescribed basis would seem in and of itself to work sufficient injury to justify the operation of laches. But the injury here is more than that. The District has been prevented all this time from closing the proceedings; it has been required to maintain its money on deposit with the Court; it has been forced to appear in Court in connection with this matter on several occasions. But the most important consideration is the excessive amount of the District Court's time that has been unnecessarily consumed. The judge below spent literally hours reasoning with appellant and attempting to induce him to share on the same basis as other bondholders. That appellant refused to do. If the doctrine of laches is to have any true equitable significance it can only be held to bar

appellant under these circumstances. Any other ruling would make a mockery of the Court. Appellant actually defies the Court and the law as declared by the Supreme Court.

Appellant apparently feels that his claim is protected against laches or the running of any statute of limitations by the provisions of Sections 851 and 852 of Title 28, USCA. It is true this section may prevent the Government from claiming money deposited in Court by virtue of a lapse of time, but it can certainly have no application where there are two contesting claimants to the fund as in this case. The money was deposited by the District to redeem its bonds in accordance with the judicial decree. The money certainly belongs to the District if the bondholder refuses to so redeem his bonds. The Government's interest is only that of a depositary, and it can therefore acquire no title to the money by the running of any time period. But as to the District, which is the owner of the money until such time as it is paid to the bondholder on the surrender of his bonds, laches and that statute of limitations most certainly can and have run.

The lower Court properly held that laches is a further bar to appellant's participation in the fund.

The 45-day provision.

Although the Court concluded that laches had occcurred and that appellant was barred by applicable statutes of limitation when it made its order, it gave him one further chance to participate in the

same manner as the other creditors. With the District's consent, it withheld refunding the money to the District for 45 days during which time appellant was authorized to surrender his bonds and receive payment at the composition rate. Laches and limitations had run and the District had thereby secured a vested property right in the remaining funds. Nevertheless, it consented to giving appellant another chance, and the Court made its order accordingly.

This is a perfectly proper procedure. Appellant argues that such a time limitation is improper under the authority of *Compton-Delevan Irr. Dist. v. Bekins*, 150 F. (2d) 526. In that case a time limit of one year was fixed in the final decree. However, the bondholders involved had no actual notice of entry of the interlocutory decree, or of entry of the final decree, or of the deposit of the money for payment at the rate provided. Such notice, though published, was never seen by these bondholders and never came to their attention. They were not personally notified although their address was of record and was known to counsel and the clerk of the Court. That case turned entirely on notice. But here appellant not only had notice and knew fully of every order and decree but appealed from each of the decrees and again from this order fixing the specified time limit. There is no analogy to the *Compton-Delevan* case.

On the other hand the authority to specifically fix a time limitation within which the bondholder must accept payment or be barred from participation has

been frequently and clearly adjudicated in this type of proceeding.[8] The purpose, of course, is to enable the eventual closing of the proceeding. If the creditor refuses to participate he cannot be allowed to prolong the proceeding and tie up the money forever.

Here the utmost time limit from the language of the final decree was the period of the statute of limitations. It might be less. In any event after that expired appellant was given more time on several occasions until finally the ultimate order was made that he was barred by laches and limitations. He then got another 45 days on top of all he'd had before, not of right, but because the District and the Court agreed to let him have it. He should be allowed no more time now. He is barred by limitations, by laches, and by an ultra legal period of grace.

In this regard we also want to point out that although the District Court has no authority to order a bondholder to surrender his bonds and accept payment at a composition rate it certainly can legitimately and conclusively tell that bondholder that if he does not do so within a certain time he can never do so. This is what the Court did and there is no error in its doing so.

Authority to make order after final decree became final.

Appellant complains that the District Court was without authority to enter this order because it is

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[8]See footnote 5, supra.

contrary and opposed to the final decree which long ago became final. That decree, it will be recalled, provides for the District to report back for further action respecting any remaining money at such time as it claims applicable statutes of limitation have run thereon. (R 27.) In petitioning that the money be returned to it the District is reporting back for further action exactly in accordance with the directions of that final decree. There is nothing contrary or opposed to it. In fact there is full compliance with it.

It is interesting to note that appellant in appealing from the final decree made this specification of error with regard to it: "The Court erred in reserving jurisdiction to make a further order in the cause." (R(9955) 58.) The decree was affirmed on appeal over such a specification of error. The right to make such a further order was thereby established and is *res adjudicata* here. To set aside this order would have the anomalous and undesirable result of perhaps forever preventing the closing of this proceeding.

Remaining specifications of error.

We believe all the remaining specifications of error made by appellant are without merit, are out of place in this appeal, and in fact were determined on the other prior appeals herein, such determinations being *res adjudicata* here.

Appellant contends in effect:

1. That this order had the effect of unlawfully giving abatement from mandatory taxation.

2. That the restraint in the final decree prohibiting bondholders from further asserting their claims is in error and should be lifted.

3. That appellant's bonds are still valid, binding and unpaid obligations of the District to the full amount of their face value and recourse should be accorded for full recovery thereon.

These specifications do not rightly go to the order appealed from here but to findings and orders contained in the interlocutory and final decrees. In fact these specifications of error sound very similar to the specifications set up in those two prior appeals (R(9242) 319, Pts. 1 and 7; and (R(9955) 59, Pts. 5, 6, 9, and 10). In any event if any unlawful abatement from mandatory taxation occurred, it occurred at the time of the interlocutory or final decrees, not with the entry of this order. Likewise the prohibitions against the bondholders further asserting their claims and attempting to collect the full face amount of their bonds were contained in those prior decrees and were determined to be valid in the appeals therefrom.

In fact appellant attempted to raise similar points in his appeal from the final decree and this Court held that those points had been adjudicated in the appeal from the interlocutory decree.[9] Even if there

[9]See footnote 2, supra.

is any merit to these points raised by appellant, and we are convinced there is not, this is no time or place to raise them.

CONCLUSION.

We have set forth the events leading up to this order. The District Court's indulgence of appellant is shown time and time again and it made a most exhaustive effort to prevent any injustice to him. It changed the originally proposed final decree to give appellant possibly the full period of the statute of limitations in which to participate, rather than to require him to do so within a period of one year as it legally could have done. For five (5) years he refused. Then the District petitioned the Court claiming the statute had run. But the Court authorized appellant to participate then if he would. It gave him time to secure legal advice. It gave him three opportunities to argue his contentions and each time advised him of its attitude in regard thereto. When he still refused it gave its order, but allowed him still another 45 days of grace though not of right.

Whatever excuses might be given for the appellant's uncertainty and equivocal actions during the hearings, certainly no such excuse can possibly exist for his failure and refusal to claim the money during the 45 day grace period. In the order it was made exceedingly clear, without any equivocation that if appellant did not surrender his bonds and accept the composition payment the District would be re-

funded the money. On some theory or belief of his own that he can some day recover the full face amount of his bonds appellant has seen fit to refuse to participate in this manner. The consequences were made clear in the order and of them appellant was well aware. With his eyes wide open he is gambling for the full amount. Whatever his claim in that regard may be, he has now certainly lost all right to the amount originally deposited for his benefit. The Court's order is thoroughly just and correct. Appellant neither deserves nor is entitled by law to any further allowances. *Interest reipublicae ut sit finis litium.*

Dated, Sacramento, California,
September 29, 1947.

Respectfully submitted,
JOHN F. DOWNEY,
DOWNEY, BRAND, SEYMOUR & ROHWER,
Attorneys for Appellee.

No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. Mason,

Appellant,

vs.

Merced Irrigation District,

Appellee.

APPELLANT'S REPLY BRIEF.

J. R. Mason,

1920 Lake Street, San Francisco 21,

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FILE

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No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON, *Appellant*, vs. MERCED IRRIGATION DISTRICT, *Appellee.*	

APPELLANT'S REPLY BRIEF.

The brief for appellee raises a fundamental principle of Constitutional law, and other matters that make this reply necessary.

Appellant has believed, and as he sees the usurpation of power and infringement of sovereignty grow in so many parts of the world, is more convinced than ever that our inherent doctrine of immunity, as steadfastly interpreted, construed and applied is basic to the survival of liberty in this Constitutional Republic. It is this unique principle embodied in our Constitutional structure, differing radically from any other government, that appellant has struggled for many years to protect and defend against Huns and vandals, whether from within or without. Lord Macaulay gave us a salutary warning in his famous letter to

Henry S. Randall, Esq., written May 23, 1857, wherein he said: "As I said before, when a society has entered on this downward progress, either civilization or liberty must perish. Either some Caesar or Napoleon will seize the reins of government with a strong hand, or your Republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman Empire was in the fifth, with this difference, that the Huns and vandals who ravaged the Roman Empire came from without, and that your Huns and vandals will have been engendered within your own country by your own institutions."

The pecuniary interest of appellant in the trifling number of bonds here involved, is inconsequential. But, the principle of intervention by the Federal authorities in the fiscal affairs of a sovereign State, when rights secured by the Federal Constitution have not been infringed, and especially intervention in respect of the State's tax and land tenure laws governing the inalienable right of every person lawfully within that State to earn, to hold land, and the equal right to appropriate its rents, issues and profits, if allowed to Congress under any circumstances is supreme and paramount. Even the leading Centralist Hamilton recognized in Essays XXXII and XXXIII *The Federalist*, that the inherent power of the States to tax land would remain "independent and uncontrollable" by virtue of any power delegated to Congress, in "the most absolute and unqualified sense".

Appellant does not here question any previous order by this Court, nor by the Supreme Court in respect of

bond obligations covered by such orders, and the effort of appellee to prejudice this Court against appellant on the ground that he has been the aggressor is unfair. The instant action was commenced by appellee, by filing a petition July 23, 1946 in the Court below. Appellee was unwilling to abide by the decision of the Supreme Court in the *Ashton* case (298 U. S. 513), and tried hard to be allowed to bludgeon the holders of the then "still outstanding bonds", but its petition was denied. (302 U. S. 709.)

Appellee can not successfully deny that its fixed and continuing duties, as a statutory trust, and land taxing body are in all respects governed and controlled by the Constitution and laws of California, exclusively.

Nothing decided in the *Bekins* case (304 U. S. 27) supports the argument by appellee (p. 13) that Congress, in enacting 11 U.S.C.A. 401-403, allowed its Courts to create any obligation "by the interlocutory decree", when, as here, such a decree would have the force and effect of allowing such governmental arms of the State as appellee (to which the State has delegated its sovereign power to tax and control privately held land), the authority to administer its delegated powers and duties according to Statutes of the Congress, and decrees of its Courts, and without regard to the laws of its creator, the State of California, or the vested property rights of appellant with whom it executed contracts.

The jurisdiction authorized in proceedings based upon 11 U.S.C.A. 401-403 as amended June 30, 1946 is far narrower than that authorized by other Chap-

ters of the Bankruptcy Act. The only jurisdiction allowed over the bankrupt must be acceptable to the bankrupt. The Court may issue no order or decree objected to by the bankrupt. *Spellings v. Dewey,* 122 F. (2d) 652; *Green v. City of Stuart,* 135 F. (2d) 33; *Ware v. Crummer & Co.,* 128 F. (2d) 114. Any interference with the fiscal affairs of appellee is not authorized, and is expressly inhibited by subdivisions (c) and (i) of Section 403, 11 U.S.C.A.

Any order or decree based on this federal statute having the effect of "interfering" with a ceiling on local property tax rates, would be a nullity, if it increased the tax rate above the ceiling provided in State law.

Here, the decree of December 31, 1946, if it stand, would have the force and effect of allowing appellee to levy taxes on real property at rates below those required in the applicable State laws, resulting in a gift and "unjust enrichment" to land holders of public funds strictly prohibited by Article IV, section 31 of the California Constitution. (R. 139.)

It seems a complete answer to the argument that the interlocutory decree "created" an obligation, to point out that appellee has not supported that argument by showing any law or citing any case. The cited *Leco v. Crummer,* 128 F. (2d) 110, case gives him no support.

Nowhere in the precisely set out provisions allowing jurisdiction under Chapter IX is any provision made for creating an obligation on debtor or creditor. Any

such provision would conflict with the "independence" of the bankrupt, which "independence" in Chapter IX cases the Court must respect at all times. *Spellings v. Dewey,* supra.

The petition filed July 23, 1946 by appellee, and which is the base of this action, presented only one subject to the District Court, as follows:

> "That the bonds and coupons listed in Exhibit 'C' are barred by the statute of limitations and that pursuant to the provisions of the final decree above quoted, petitioner so reports to this court * * * Wherefore, petitioner prays that the unexpended funds in the hands of the Registrar * * * be paid by said Registrar to petitioner * * *". (R. 34.)

The brief filed by appellee in this Court adopts very different arguments, from the stand taken below, when appellee said:

> "It is our position that the court is now without jurisdiction to allow Mr. Mason to take the money if he now desires to do so. If the statute of limitations has run as we contend, the court would seem to have no jurisdiction except to order the money returned to the Irrigation District. General equity would not seem sufficient to override a substantive rule of law." (R. 55.)

The final decree (R. 26) expressly recognizes the bonds owned by appellant as "still outstanding obligations", in paragraph 2. (R. 27.) Exhibit "C" (R. 38) filed by appellee with the instant petition, listed the "still outstanding" obligations, as being original bonds.

Appellant objected that the question raised by this petition "presents and gives rise to a distinct and separate cause of action ruled by State law, and which should have been addressed to a court of California". Appellant then prayed that the Bankruptcy Court "leave to the courts of California the matter of fixing the rights of the parties involved * * *" (R. 43/48.)

Exhibit "C" (R. 38) shows that only three bonds owned by appellant are past due, the rest not being lawfully due or payable until 1952 to 1961. None of the bonds are subject to call or redemption before their fixed maturity dates. No statute of limitations "applicable to the still outstanding obligations" could possibly commence to run before bonds are due, and payable according to the State laws governing State bonds.

The California Legislature extended the statute of limitations to ten years on State and local bonds, at its last session. Stat. 1947, Ch. 626.

Appellee does not deny that appellant duly presented his bonds and coupons which have matured, but questions that the substantive rule of law settled in the *Moody* case (12 C. (2d) 389) makes inapplicable some statute of limitations to the "still outstanding" bonds owned by appellant.

After considering the objections filed by appellant (R. 43) and the oral arguments (R. 105/157) the District Court finding no statute applicable to the "still outstanding" bonds, decided the order sought must be denied. (R. 57.)

No statute of limitations "applicable to the still outstanding" bonds is shown in the record or the brief of appellee filed in this Court.

Adhering to the stand taken in his letter of November 12 (R. 55) appellee argued on November 15:

> "* * * regardless of whether this court in this type of proceeding may generally have equitable powers, it is our definite position that in this particular proceeding it does not have those powers * * *". (R. 127/128.)

Manifestly it was never meant in the final decree that the "still outstanding" bonds and coupons were obligations "created by the interlocutory decree", as now argued (p. 13) by appellee. The refunding bonds of the district were not, by any possible interpretation the "*still* outstanding obligations", and were in no respect "created by the interlocutory decree", but by the laws of California, which form the only base of all obligations, whether outstanding or "still outstanding", of every Irrigation District. Appellee's strained attempt to argue that any outstanding obligation of Merced Irrigation District, is an obligation created by Federal law (i.e. the Bankruptcy Act) (p. 12) is as shocking as if he attempted to argue that Federal obligations are created by State law, and State Courts.

It is respectfully submitted that there is a recognition of the existence of the "still outstanding" original bonds, in paragraph 3 of the final decree, where it is said "That except as provided in paragraph 2 * * * all the old bonds * * * affected by the plan * * *

are hereby cancelled and annulled." (R. 27/28.) Appellant has never submitted his bonds to the jurisdiction of any Court of Congress, either with his proof of claim, or otherwise.

> "The Court. Mr. Mason did not allow it * * *" (R. 133.)

It appears from appellee's brief that he now completely repudiates the laws of California which govern and control appellee's duties under applicable law (Stat. 1897, p. 254 as amended) and claims to be controlled by a decree of the Federal judiciary, wholly unauthorized by Federal or by applicable State law, saying "Here the situation is entirely different". (p. 13.)

The charge "Appellant actually defies the Court" (p. 17) is without merit. (R. 115/124.) At no point did the Court order appellant to turn his bonds into the Court, and although appellant offered to surrender his bonds under protest, the Court would not allow it. (R. 119.)

> "* * * a party may stand upon the terms of a valid contract in a court of equity as he may in a court of law."
>
> *In re National Mills*, 133 F. (2d) 604;
>
> *Mfrs. Trust Co. v. McKey*, 294 U. S. 442, 55 S. Ct. 444, 448.

The bonds impose duties on Merced County, separate and distinct from any duty of the District. That obligation was not cancelled by the final decree, because the County was never a party in the proceeding.

Kelby v. Mfrs. Tr. Co. (C.C.A. 2), 162 F. (2d) 350; *Nevada Nat. Bank v. Sup.*, 5 Cal. App. 638; Stat. 1943, Ch. 368, sec. 26525/26553. Even if the bonds were outlawed, that would not make them worthless, under the rule applied in *Ward v. Chandler Sherman Corp.*, 76 A. C. A. 453.

The judgment here appealed from (R. 76/79) goes beyond the complaint (R. 30/40) and is an error of State law, which law appellee contended is decisive of the only point involved. (R. 55/56.) The "still outstanding" bond obligations owned by appellant are not lawfully due or payable until 1952, and then serially to 1961, except for 3 bonds lawfully payable in 1940, 1941. No statute of limitations could possibly be "applicable" to obligations not legally due. The statute applicable to past due bonds was extended to ten years by the Legislature. (Ch. 626, Stats. 1947.)

Congress, in enacting 11 U. S. C. A. 401-403 never intended to allow any taxing arm of a sovereign State to govern their fiscal affairs without due regard for State law and decisions. *U. S. v. Bekins*, 304 U. S. 27. It was pointed out in *Mission Sch. Dist. v. Texas* (C.C.A. 5), 116 F. (2d) 175, that Chapter IX contains

> "* * * an express requirement that nothing shall be agreed on which State law does not enable it (debtor) to do."

The great strictness with which the Court disallows any action by irrigation district not expressly authorized by State laws is shown in *Meyerfeld v. S. S. J. I. D.*, 3 C. (2d) 409. If the funds *in custodia legis* were

deposited by appellee, or belong to appellee, such deposit violated Stats. 1939, p. 1040 governing the deposit of District funds, and Stats. 1943, Ch. 368, secs. 24350/24393.

The provision for surrender of Bonds, in Stats. 1943, Ch. 368, sec. 24735, reads as follows:

> "24735. Any owner of any bonds * * * of a district may surrender them to the district by giving the bonds * * * to the secretary for cancellation.
>
> 24736. The board shall then order the bonds * * * cancelled.
>
> 24737. Upon the making of the order, the bonds * * * shall cease to be an obligation of the district as of the time of their presentation to the secretary."

The provision for paying the bonds, reads:

> "25219. Unless otherwise provided in the proceedings for the issuance of the bonds, they and the interest on them shall be paid from money derived from an annual assessment upon land or charges which in the discretion of the board are fixed and collected in lieu thereof and all land shall be and remain liable to be assessed for these payments."

There was absolutely nothing "otherwise provided" in the proceedings for the issuance of the bonds owned by appellant, no provision in the applicable statutes for a receiver, or any interference by any Court.

If there is any statute of limitations applicable to either party in this case, it is submitted that Section 336 of the Code of Civil Procedure applies to appellee,

because he filed this action July 23, 1946, which is more than 5 years after July 15, 1941, the date of the final decree. (R. 26.)

Any tender of only a portion of the money lawfully payable fails to meet the requirement in the *Moody* case, and it is vigorously denied that appellee was justified in saying such requirements had ever been met. (p. 13.)

In any event, there is no authority whatever in 11 U. S. C. A. 401-403 allowing a Court to create any obligation, old or new, but such authority is expressly denied.

Such authority exists in the sovereign State of California, its Legislature and qualified electors exclusively, and Congress has no authority whatever to create any obligation upon a State, or its arms of government, or their creditors.

The bonds of such districts, however, do constitute contracts, secured against impairment by the Federal and State Constitutions. *Shouse v. Quinley,* 3 C. (2d) 357, *Roberts v. Richland I. D.,* 289 U. S. 71.

The argument offered by appellee that "* * * the obligation created by the composition proceedings * * * " (p. 13) is wholly unsupported, and must fail, for the reasons herein shown. No authority to create any such obligation is granted to any Court, by any statute of the Congress.

Appellee's duties to assess all taxable land within its boundaries are fixed and continuing until all of its obligations are fully paid.

> "Courts of equity do not review the proceedings of officers entrusted with the assessment of property."
>
> *Las Animas v. Preciado,* 167 Cal. 580;
> *Gardner v. N. J.* (1947), 15 U. S. L. W. 4171;
> *Ark. Corp. v. Thompson,* 313 U. S. 132, 145.

That no private holder of taxable land in a California Irrigation District is protected like persons in a contract relationship with the State or its taxing bodies, was affirmed in *Fallbrook P. U. D. v. Cowan,* 131 Fed. (2d) 513, by this Court. Despite strenuous objections in the petition to the Supreme Court, the writ was not allowed.

The priorities created by similar law are well explained in *In re Horse Heaven I. D.,* 118 P. (2d) 972, 11 Wash. (2d) 218.

Under the broadest conception of the power of a Bankruptcy Court to protect or enforce its own decrees, the District Court was without jurisdiction of the question presented in the Petition (R. 30) which forms the base of this case.

> "No one has supposed that the power extends beyond enjoining state court proceedings which challenge the validity of rights decreed by the federal court."
>
> *In re Ambassador Hotel Corp.* (C.C.A. 9), 124 F. (2d) 435.

LACHES.

The funds *in custodia legis* are not the "still outstanding obligations" meant in the final decree.

The District Court was not asked in the petition of July 23, 1946 to consider whether laches had occurred, but only to find "That the bonds and coupons listed in Exhibit 'C' are barred by the statute of limitations." (R. 34.)

Appellee has not proven any right, title or interest in or to the funds *in custodia legis*, which funds may only be disbursed as provided in the final decree, and Sections 851 and 852 of Title 28, U. S. C. A.; Bankruptcy Act §66, sub. b, 11 U. S. C. A. §106, sub. b; *In re Bishop* (U.S.D.C. N.J.), 72 F. Supp. 199.

If the District Court had no jurisdiction to allow appellant to draw the funds *in custodia legis*, as contended by appellee (R. 55), the Court was equally without jurisdiction to give appellee those funds while valid claims against them exist.

The District Judge took the view that the question presented by the July 1946 petition, the base of this action, is governed by federal, and not by State law.

> "The Court. I do not think it involves a question of State law. It involves a question of law under the Bankruptcy Act." (R. 118.)
>
> "The Court. Do you have the Act there, Mr. Downey? Would you read that portion of the Act again that relates directly or indirectly to the question of limitations.
>
> Mr. Downey. I think there is no mention of limitations in the Act. I can find nothing there

that does say there shall be a limitation. We have to go outside of the Act and into State Law to find the limitation in that regard." (R. 128/129.)

"The Court. That is true. There are many cases, of course, involving the doctrine of laches in which the courts have used as a yardstick the local statute of limitations on similar questions, but that would be the extent * * * The court of equity is to be guided by its own conscience * * * There is no statute." (R. 141.)

"The Court. "* * * The District certainly has no equities here." (R. 138.)

The force and effect of the decree here appealed from, if it stand, would be to give the funds *in custodia legis* to the District which "certainly has no equities here", and discharge the District from the taxing duties imposed by the Constitution and statutes of California, in respect of the "still outstanding" valid, binding and unpaid original bonds owned by appellant.

Appellee argues "it has been required to maintain its money on deposit with the court". (p. 16.) Appellee is a statutory trust with no money or property that ever did belong to "it". *El Camino v. El Camino,* 12 C. (2d) 378. It has been held that the bonds are contracts between the land holders (taxpayers) and the bond owners. *Hershey v. Cole,* 130 C. A. 683. The District is merely a trustee, ruled completely by State law. The laws in effect when the bonds owned by appellant were issued prescribed the deposit of money by appellee, and did not authorize appellee to deposit

any money with any Court. Nor did the amended Stats. 1939, p. 1040 allow it.

CONCLUSION.

Appellee is one of the most important and flourishing communities in all California, containing as part of it, for purposes of taxation, all urban land in the cities and towns of Merced, Atwater, Livingston, etc. It has gotten in, by one means or another, during the past 16 years, all of the original bonds, except the few owned by appellant, and one other bond whose owner is unknown. (p. 9.)

The vast public improvement works, water rights, dams, power plants, canals, etc., acquired by appellee with the proceeds of the original bonds could not be duplicated anywhere in California at many times their cost.

There is an easy way for appellee to get the funds *in custodia legis,* and that is to recognize the $3000 past due bonds owned by appellant by paying them, with defaulted interest, move this Court to set aside any restraint against appellant, and there will be no one in position to object. All the other original bonds are cancelled, and they certainly are no longer "still outstanding obligations".

The following observations by the learned Judges in another State are submitted as being in point with the "open violation of law" for which the brief filed by appellee seeks allowance:

> "Is it not time to find some remedy for this situation, other than one involving an appeal to the courts to enforce a system for tax assessments which is plainly in violation of the law as written? It would be refreshing, indeed, if some tax payer, or group of tax payers, would sponsor an effort to see that our tax laws are obeyed, rather than to take advantage of their open violation. It is not for this Court to point out ways by which regard for law may be required by public officials, but they exist."
>
> *In re Charleston Fed. Sav. & Loan Assn.,* 30 S. E. (2d) 513 (W. Va.).

The District Court decree, if it stand, could only mean that the Congress, in enacting 11 U.S.C.A. 401-403 has, in effect, sought to delegate to its Courts the task of rewriting the land laws of a sovereign State, and to disregard State law, as construed by the highest State Court.

The power of a sovereign State to tax land within its domain, whether exercised by the State directly, or through a local unit of government is still immune from federal interference. (*State of N.Y. v. U.S.,* 326 U.S. ......; *Arkansas Corp. v. Thompson,* 313 U.S. 132.) This principle was reaffirmed, and in no respect modified in the *Bekins* case. That sovereign State power was exercised by California upon the issuance of the bonds owned by appellant. (*Fallbrook I. D. v. Bradley,* 164 U.S. 112.)

> "Any practice which removes the land from its position as ultimate security for the bonds, or which places its proceeds (rents, issues and

profits) beyond the reach of the bondholders, destroys that plan and is contrary to the spirit of the Act * * * The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid."

Provident v. Zumwalt, 12 C. (2d) 365.

It is therefore respectfully prayed that the decree below be set aside, that the funds *in custodia legis* be distributed only according to the provisions in the final decree, and laws applicable, and that the State Court be allowed to adjudge whether the "statute of limitations applicable to the still outstanding obligations, if any, has run".

Dated, San Francisco,
October 10, 1947.

Respectfully submitted,
J. R. Mason,
Appellant Pro Se.

No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON,

Appellant,

vs.

MERCED IRRIGATION DISTRICT,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

J. R. MASON,

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Appellant Pro Se.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,554

IN THE

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J. R. MASON,

Appellant,

vs.

MERCED IRRIGATION DISTRICT,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

J. R. Mason, appellant, respectfully petitions for a rehearing in the above entitled case and reversal of the order entered by this Court January 19, 1948, upon the following grounds:

The petition which is the base of this case presented one point, and only one point, as follows: "That said bonds and coupons listed in Exhibit 'C' are barred by the statute of limitations and that pursuant to the provisions of the final decree above quoted, petitioner so reports to this Court. * * * Wherefore, petitioner

prays that the unexpended funds in the hands of the Registrar * * * be paid by said Registrar to petitioner * * *". (R. 34.) The Exhibit "C" which accompanied this petition is shown. (R. 38.)

The Objections of J. R. Mason (R. 43/49) raised a question of law. The Court fixed a time for oral argument October 29, 1946 the record of which appears. (R. 105/126.) On November 12, 1946 Attorney Downey addressed a letter to the Court (R. 55) in which he argued,

> "It is our position that the court is now without jurisdiction to allow Mr. Mason to take the money if he now desires to do so. *If the statute of limitations has run as we contend, the court would seem to have no jurisdiction except to order the money returned to the Irrigation District. General equity authority would not seem sufficient to override a substantive rule of law.* * * * It is true that in the final decree the court said in effect that upon the expiration of the statute of limitations period the District might report back to the court for such action as the court deemed advisable. However, *we do not make our case upon that order* but upon statutory and substantive rules of law by virtue of which we claim that the court *cannot exercise discretion in the premises but can only apply the law as it exists* * * *" (Emphasis ours.)

Following further oral argument (R. 126/157) a minute order was entered, as follows, "It is ordered that the petition herein is denied." (R. 57.) Objections were filed to the proposed order (R. 58) for the

reasons shown. (R. 59/71.) The oral arguments on these objections are shown. (R. 157/199.)

When asked to show the applicable statute, Attorney Downey said,

> "I think there is no mention of limitations actually in the Act. I can find nothing there that does say there shall be a limitation. We have to go outside of the Act *and into state law to find the limitation in that regard.*" (Emphasis ours.) (R. 129.)

When asked if he would "be willing to have the restraints now embodied in the final decree stricken?" (R. 184) Attorney Downey answered, "We do not intend to propose that the final decree be revised or altered." (R. 185.)

The order of the District Court was entered two days later, and before appellant even received copy of the proposed order and decree, to the form of which he objected within the five days allowed by the rules. (R. 80/83.) It was again pleaded in this objection that "Disbursement of funds in the Registry of the Court in these cases is governed by Title 28 of Judicial Code, Secs. 851, 852, and the proposed order, if signed would clearly appear to be contrary to its explicit provisions." (R. 81/82.) This objection was "determined to be without merit" by the District Court. (R. 83.)

Appellee at no point in the District Court or this Court proved any right, title or interest in or to the funds in *custodia legis,* the disbursement of which

funds is governed by the provisions in Title 28, Judicial Code, Sections 851, 852 as pointed out in Point 4. (Brief for Appellant, pp. 6, 7.) Appellee argues in his brief, page 7, that this federal statute "can certainly have no application where there are two contesting claimants to the fund as in this case." This contention was vigorously denied in appellant's reply brief, page 13, as follows: "Appellee has not proven any right, title or interest in or to the funds in *custodia legis,* which funds may only be disbursed as provided in the final decree * * *".

Appellee is a statutory trust, all of whose money, land and property is dedicated a public trust. It is without any authority to claim the funds in *custodia legis.* The funds in *custodia legis* never did "belong" to appellee, except as trustee "for the uses and purposes" of the applicable state laws cited by appellant in his brief, especially at pages 19, 23.

Stats. 1943, Ch. 368, Sec. 22437 provides:

> "The title to all property acquired by a district is held in trust for its uses and purposes."

Sec. 24350 provides:

> "Any money belonging to a district may be deposited * * * in accordance with the general laws governing the deposit of public money."

Sec. 24352 provides:

> "Where arrangements have been made by the district with the R.F.C. for deposit of district funds in the Federal Reserve Bank of the U. S., such deposits may be made in that bank or any

> branch of it without requiring any security or interest."

The only statute that appears to cover the final disposition of funds of a District in *custodia legis* is Code of Civil Procedure, Sec. 1274b. It provides that when such funds have not been paid out, the court

> "must direct that such money be deposited in the State Treasury for the benefit of the owner thereof or his legal representative, to be paid to him whenever, within five years after such deposits, proof to the satisfaction of the State Controller and the State Treasurer is produced that he is entitled thereto. * * * If no one claims the amount, as herein provided, the money devolves and escheats to the people of the State of California and shall be placed by the State Treasurer in the School Fund." (Stat. 1931, p. 1955.)

Ch. 368, Sec. 27518 provides:

> "Whenever all the property of a district has been disposed of and *all* the obligations thereof, if any, have been discharged, the balance of the money of the district shall be distributed to the assessment payers * * *".

Therefore, under no circumstances can the funds in *custodia legis* be lawfully claimed by appellee as "belonging" to it, and Secs. 851, 852 of Judicial Code, Title 28, authorizes no "equitable" jurisdiction for funds in *custodia legis* under any circumstances. Bktcy. Act § 66, sub. b; 11 U.S.C.A. § 106, sub. b; *In re Bishop,* 72 F. Supp. 199 (U.S.D.C. N.J.).

The petition on which this case is based, did not ask or even suggest that the District Court could or should give appellee the funds in the Registrar's hands within 45 days, or any other period of time, unless the Court found that "the statute of limitations applicable to the still outstanding obligations" as provided in the final decree had run, as a matter of law.

Although the District Court, not finding any applicable statute, denied the petition in its minute order (R. 57), it later reversed and ruled the statute had run. (R. 96.) It is from this order that this appeal was taken. The District Court allowed appellant time for appeal in its order of January 22, 1947. (R. 87.) The order by this Court did not modify that order, which this Court may have overlooked, when it said "The order will be modified by striking therefrom the phrase 'from the date hereof' * * *".

This Court also found that "There was and is no such statute" (of limitations applicable to the still outstanding bonds and coupons listed in Exhibit "C", above), and having so found, the petition should have been denied. Instead of denying the petition, this Court announced that the one and only point presented in the petition "need not be considered; for after reaching the conclusions mentioned, the Court concluded that it was 'nevertheless vested with equitable power and authority to authorize the owners of said bonds and coupons an additional period of 45 days' * * *".

This order, instead of allowing appellant an "additional" time within which to claim the money in *custodia legis,* did exactly the opposite.

In allowing this assignment of funds in *custodia legis,* the order and decree as it stands is not only a novation, without warrant of law, but, in view of the injunctive provisions in the final decree of July, 1941 (R. 27, 28), it jeopardizes appellant's rights to the extent that unless he deposits his bonds within 45 days, his "still outstanding" bonds, most of which are neither lawfully due or payable, and none of which are redeemable before their fixed due dates, will still be "outstanding obligations", so recognized by the final decree, and still a lawful investment for savings banks and trust funds in California, but if the view of this Court that "All the old bonds were affected by the plan" prevails, they will, after 45 days become as worthless as other State and local government bonds which were made worthless because of some constitutional infringement such as in the *Browning v. Hopper* case, 269 U.S. 396. At no stage of the proceedings under Chap. IX was any claimant heard who even hinted that the ownership by appellant of the "still outstanding" bonds and coupons infringed any right secured by the Constitution of California, or the United States. That no such claim could be validly made was settled in *Fallbrook I.D. v. Bradley,* 164 U.S. 112; *Fallbrook v. Cowan,* 131 F. (2d) 513 (cert. denied); *Provident v. Zumwalt,* 12 Cal. (2d) 365, and other cases too numerous to cite.

Therefore, if the injunctive provisions in the final decree, in so far as they might be interpreted as applying to the "still outstanding" bonds, is not stricken or clarified, and the funds in *custodia legis* are paid out after 45 days without regard to the clear terms and provisions fixed in the final decree, appellant will be prejudiced even more than by anything contained in any order or decree in the Ch. IX proceedings.

Whether "the person who drafted the final decree assumed that there was a statute of limitations" is immaterial. The final decree proposed did provide a fixed limitation period. (R. 22/25.) The final decree which was signed and entered contained none. (R. 26/29.) The opinion of this Court affirms the contention of appellant that "There was and is no such statute" (of limitations applicable to the still outstanding obligations).

It is further submitted that nothing in any order or decree of the proceedings under Ch. IX went so far as to hold that "*All* the old bonds were affected by the Plan", as said by this Court in footnote 6, page 3, of its opinion. The final decree expressely designated and recognized the bonds owned by appellant as "still oustanding obligations", and excepted them from the injunctive provisions in paragraph 3 in clear language, as follows: "That *except* as provided in paragraph 2 hereof, all the old bonds and other obligations of petitioner *affected by the plan* * * * are hereby cancelled and annulled". Had the Court intended to include the "still outstanding" bonds, it could as easily have said "*All* the old bonds

are affected by the plan, and they are *all* hereby cancelled and annulled."

But even had *all* the old bonds been "affected" by the "plan", which appellant has always denied, and here again denies, that point is wholly unrelated to the instant case, which is bottomed on the petition filed by appellee July 23, 1946, more than 5 years after the final decree in the proceeding ruled by the Federal statute, 11 U.S.C.A. 401-403.

Appellee at all times not only recognized but insisted that State law and decisions must govern and control the rulings upon the petition filed July, 1946, and which forms the base of the instant case, saying (R. 55),

> "* * * We do not make our case upon that order (the final decree) but upon statutory and substantive rules of law by virtue of which we claim that the Court can not exercise discretion in the premises *but can only apply the law as it exists.*" (Emphasis ours.)

In addition to the above grounds, appellant also stands upon all the other points presented in his briefs, and in the record (R. 201), and also expressly reserves the right to urge in the Supreme Court of the United States, and in the California Courts that the United States Circuit Court of Appeals has not acquired federal jurisdiction of the appeal herein.

If there is any statute of limitations applicable to the claims of either party in this case, it is applicable to appellee, who unnecessarily and inexcusably waited

more than five years to get an interpretation upon the force and effect of the final decree of July 14, 1941. This was covered in the reply brief for appellant, pp. 10, 11. No right, shown or even claimed by appellee has been damaged by reason of the fact that appellant has preferred to leave the money dedicated to be paid for his claim in the Registry of the Court, rather than in some bank also without interest.

Nothing ordered in the Ch. IX proceeding "required" appellant to withdraw the funds in *custodia legis* until he desired to do so. No interest is paid upon such funds, and nothing in Chapter IX of the Bankruptcy Act, or in any applicable Federal statute fixes a time limit within which such funds are subject to any escheat, and no limitation was placed in the final decree, which appellee at all stages of the instant case, also insists is *res adjudicata.*

It is submitted that the view expressed in the instant opinion of this Court that "The interlocutory decree * * * *required* appellee to deposit" funds with the Registrar, is not accurate.

The provisions of Ch. IX have been construed as inhibiting the Court "requiring" anything to be done by the bankrupt, unless allowed by State law and decisions. *Spellings v. Dewey,* 122 F. (2d) 652, Cir. 8; *Green v. City of Stuart,* 135 F. (2d) 33, Cir. 5 (cert. denied).

Nothing contained in Ch. IX authorizes the Federal Court to "require" even the holder of one single

bond to deposit his bond with the Court, or its Registrar, even though it is true that he is not entitled to get the funds in *custodia legis* without depositing the bonds with the Registrar.

The only provision for enjoining suits by bondholders is in Sec. 403(c), as follows:

> "Upon entry of the order fixing the time for the hearing, or at any time thereafter, the judge may upon notice enjoin or stay, *pending the determination of the matter,* the commencement or continuation of suits against the petitioner * * * *except where rights have become vested,* and may enter an interlocutory decree providing that the plan shall be temporarily operative * * *". (Emphasis ours.)

The statute is carefully drawn and does not authorize any restraint or injunction to be embodied in the final decree, and it was an error of law when this Court allowed the restraint complained of, to stand, and also assigned the funds in *custodia legis* to the bankrupt after 45 days, while deciding "There was and is no such statute." The Court below was urged to strike the unauthorized restraints in the final decree. (R. 43/49.) This same point was raised in the appeal, and presented under Point 6, at pages 22/26 in brief for appellant.

> "To effect a forfeiture, which the law does not favor, the evidence must be clear and convincing and must not call upon a court of equity to do an inequitable thing".
>
> *Hendrix v. Altman Lbr. Co.,* 145 F. (2d) 501, Cir. 5.

Even had there been a statute of limitations applicable to the claim of appellant, that fact, without more, would not make it equitable for a Court to assign the funds in *custodia legis* to appellee, without a showing and proof that those funds belong to appellee, under the law.

Appellee charges in his brief (p. 15) "Appellant has persistently and continuously for many years refused to accept the deposited money and surrender his bonds". The Record shows this statement is unwarranted and unfair. The Court asked appellant:

> "Now may I ask you a question. You do not have to answer it unless you want to. Are you willing to accept the amount which the other bondholders have accepted for their obligations?
>
> Mr. Mason. Your Honor, I am willing to accept it under protest." (R. 119.)
>
> "Mr. Mason. * * * If you tell me that I either must unqualifiedly accept the offer or I am alienated, if that is the demand or suggestion, I would just like to know.
>
> The Court. I haven't made any suggestion. I have asked you a question". (R. 121.)

This conclusively refutes the above charge that "Appellant has persistently and continuously for many years refused to accept the deposited money * * *". It also proves the falsity of the accusation, "Appellant actually defies the Court and the law as declared by the Supreme Court." (p. 17.)

Appellant has at all times been willing to take his prorata of the funds in *custodia legis* without preju-

dice to his right to contest the amount or the right to additional compensation according to the laws of California applicable to the bonds and coupons owned by him. The Court refused this acceptance. (R. 119/126.)

The order and decree of this Court, if it stand, has the force and effect of an assignment of the trust fund in *custodia legis,* and also of a novation from the final decree in the Chap. IX proceeding, and unless the injunctive provisions in the final decree are also set aside, the vested rights of appellant as the owner and holder of $17,000 Merced Irrigation District original, unrefunded General Obligation 6% Gold Bonds, recognized in the final decree as constituting "still outstanding obligations", and secured against impairment both by the Constitutions of California and the United States will, within 46 days after the instant decree becomes final have become worthless in the hands of appellant, although still valid and binding obligations according to the Constitution and laws applicable in California, and also by decisions of the Supreme Court of the United States, which decisions are still controlling, and were not reversed by the *U. S. v. Bekins,* 304 U.S. 27, case, or by any decision of the United States Supreme Court either before or after the *Bekins* case.

The constitutional principles governing and controlling the rights of owners of land and bond obligations like those owned by appellant have been construed and applied in countless cases, among which are cited:

Fallbrook I. D. v. Bradley, 164 U.S. 112;
Mobile County v. Kimball, 102 U.S. 691;
Houck v. Little River District, 239 U.S. 265;
Hancock v. Muskogee, 250 U.S. 454;
Branson v. Bush, 251 U.S. 189;
Milheim v. Moffat Tunnell, 262 U.S. 710;
Roberts v. Richland I. D., 289 U.S. 71;
Huddleson v. Dwyer, 322 U.S. 232;
American Sec. Co. v. Forward, 220 C. 566 (affirmed 294 U.S. 692).

The California Irrigation District law is, at bottom, a rent control law, under which encumbrances and liens are fixed on the rents, issues and profits of restricted land within the domain of the State. The bonds of such districts are rent trust certificates, secured by the ground rent until paid, and whether such rent is collected by the district by way of an annual ad-valorem assessment, or as a beneficent landlord. *Provident v. Zumwalt,* 12 Cal. (2d) 365; *Moody v. Provident,* 12 Cal. (2d) 389. The levy, collection and enforcement of such land value taxes is subject to State law, and no interference by Congress is constitutionally possible. *Arkansas Corp. v. Thompson,* 313 U. S. 132. Nothing contained in 11 U. S. C. A. 401-403 or in the hearings or debates suggests that Congress intended to give its Courts any power to interfere in any way with the sovereign power of a State to tax and control the tenure or ground rent of land within the domain of the State.

It is clear that any order by the Federal judiciary to allow the States, or their taxing arms to circumvent or repudiate their fixed obligations to publicly collect ground rent arising from land within the domain of the State, would unconstitutionally interfere with what the Supreme Court has called "the unrestrained power of the State over political subdivisions of its own creation." *Faitoute v. Asbury Park,* 316 U. S. 502, 509.

The order and decree of this Court, if it stand, has not only the force and effect of making an unconstitutional gift of ground rent to feudal interests with no legal or equitable claim to it, but also of depriving appellant of his property, as owner and holder of the $17,000 lawful bond obligations of Merced Irrigation District, in violation of the 5th and 14th Amendments, and Section 10 of Article I of the U. S. Constitution, and also in violation of Article I, Section 16; Article I, Section 21, and Article XIII, Section 6 of the California Constitution.

> "One branch of the Government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small measure on a *strict* observance of this salutary rule." (Italics ours.)
>
> *Sinking Fund Cases,* 99 U. S. 700, 718.

For the foregoing reasons, and the other points raised in the appeal, none of which are abandoned, it is submitted that the judgment of this Court should be

reversed and the cause remanded with directions to dismiss the petition upon the ground that "there was and is no statute", and that to such end this petition for a rehearing should be allowed.

Dated, San Francisco,
February 14, 1948.

J. R. Mason,
Appellant Pro Se.

Certificate.

I hereby certify that I am the appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 14, 1948.

J. R. Mason,
Appellant Pro Se.